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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 96-_____

ROBERT DUSHAW,

Petitioner,

v.

ROADWAY EXPRESS, INC. and TRUCK DRIVERS LOCAL UNION NO. 407,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

Questions Presented For Review

I. In a hybrid Sect. 301 action is a discharged employee, who at trial has proven to the factfinder's satisfaction, that his union breached its duty of fair representation by processing his discharge grievance in an arbitrary, discriminatory, and bad faith manner, also required to prove the additional element of taint in order to escape the rule of arbitral finality?

II. If the discharged employee is required to prove taint, must he prove it by independent, direct evidence that the joint committee would have reached a different decision had there been no breach of the duty of fair representation, or may taint be proven by inference from the same evidence by which the employee proved the breach of the duty of fair representation ?

III. May an appellate court overturn the district court's findings of fact on a very close question, which findings were based in part upon a crediting of the testimony of one or more witnesses,

without finding that the credited witnesses' versions of the facts were incoherent, facially implausible, or contradicted by extrinsic evidence?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner, Robert Dushaw, and Respondents, Roadway Express, Inc. (hereinafter, "Roadway" or "the employer") and Truck Drivers Local Union No. 407 hereinafter, "Local 407" or "the union").

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 96-_____

ROBERT DUSHAW,

Petitioner,

v.

ROADWAY EXPRESS, INC. and TRUCK DRIVERS LOCAL UNION NO. 407,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Robert Dushaw, petitions the Court to grant a writ of certiorari to review the decision of the United States Court of

Appeals for the Sixth Circuit, which reversed the decision of the United States District Court for the Northern District of Ohio, which had granted judgment in favor of Petitioner on his hybrid breach of contract/breach of the duty of fair representation claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in the Appendix at pages 1 through 13("A-1 to A-13"). The order of the court of appeals denying rehearing is reproduced at A-14 to A-16. The relevant opinion of the United States District Court for the Northern District of Ohio is reproduced at A-17 to A-87.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit issued its opinion on September 27, 1995. That court denied the Petition for Rehearing on December 1, 1995. (A-14). One extension of time in which to file this Petition was granted by the Honorable Justice John Paul Stevens on

December 15, 1995 extending the time for filing until January 26, 1996. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED IN THIS CASE

Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185.(Reproduced at A-88)

RULE OF CIVIL PROCEDURE INVOLVED IN THIS CASE

Rule 52 (a) of the Federal Rules of Civil Procedure.(Reproduced at A-90)

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioner, Robert Dushaw, was employed by Roadway as a city delivery driver for twenty one (21) years, from February 24, 1966, until his discharge on April 21, 1987. Petitioner was also the elected union steward from 1982 until his discharge. As a result of his discharge Petitioner lost his job, his seniority,

his wages, his fringe benefits and was ultimately forced to file this suit to obtain a remedy.

Roadway held a disciplinary hearing concerning Petitioner on April 21, 1987. Dushaw was represented at the hearing by the union's business agent, Richard Sanzo ("Sanzo") and the union's alternate steward, Ken Scullion ("Scullion"). Scullion was Petitioner's rival for the steward position. There had long been bad blood between them. To justify the discharge Roadway relied primarily on Dushaw's alleged conduct in connection with the "Gray Drug incident" of March 4, 1987 and the "Beachwood incident" of April 20, 1987. Scullion falsely "testified" at the April 21st hearing presenting damaging evidence against Petitioner about both of these incidents. [1] Roadway relied heavily on Scullion's false statements in making its case to the grievance committees.

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[1] This would be akin to a criminal defense attorney telling the jury in an opening statement that his client committed the crime. The fact that the client might later testify that he did not do it could hardly remove the taint from the defense attorney's assertions.

1. The Gray Drug Incident.

On March 4, 1987, Dushaw made a delivery to Gray Drug. Roadway's chief complaint was that Dushaw took too long to unload the freight. [2] Scullion falsely "testified" that he loaded all or most of the freight on Plaintiff's trailer earlier that day. He claimed that it was all loaded on wooden pallets or "skids", making it easy for Petitioner to unload quickly. The truth was that Scullion loaded little or none of the freight that day and that most of it was not "skidded".

The joint committees were never fully informed of the true facts. They were provided with a copy of the loading manifest showing, *inter alia,* which dockmen loaded which freight. However, this copy was not legible. Had it been, it would have revealed that Scullion lied about having loaded Dushaw's trailer. Dushaw, who had no way of knowing who

[2] As a city driver Plaintiff's duties would include driving to a customer's location with the loaded trailer and making the deliveries. He would also unload the trailer upon reaching the customer's location. But he would not load up the trailer prior to his departure from the Roadway terminal. This loading would have been done by a dockmen.

loaded his freight without a legible manifest, could not and did not testify at the grievance hearings that Scullion did not load his trailer.

The district court concluded, upon a review of the manifest and explanatory oral testimony, that Scullion loaded little, if any, of Dushaw's freight that day. The court was able to reach this conclusion because, unlike the joint committee, it was not left in the dark with an illegible document, the significance of which was not explained.

2. The Beachwood Incident.

Roadway also contended that it discharged Dushaw because he did not properly follow his Beachwood delivery route on April 20, 1987. Roadway insisted that Dushaw's performance was unsatisfactory because he skipped six stops and engaged in improper "back-tracking". Dushaw testified that he skipped these stops because he was unable to remove their freight without significant delay, since the freight had been loaded improperly. His testimony was fully credited by the district court.

Scullion falsely "testified" at the April 21st hearing that he loaded "a majority" of the freight on Dushaw's trailer earlier that day and that it was loaded in such a way as to permit easy access. According to Scullion and Roadway, Dushaw could have easily unloaded the freight in the proper order without skipping any stops. Roadway relied on this "testimony" in its presentations to the grievance committees.

The loading manifest for the Beachwood incident was presented to the Joint Committees by Roadway. However, the Committee members specifically asked for Scullion's "checker number"[3] so that they could determine how much of the freight he actually loaded by reviewing the manifest. They never received that information.

The committee members were left with the false and unrebutted impression that Scullion had loaded "a lot or a majority" of the freight and would seemingly have been in a good position to provide evidence as to how the trailer was loaded. Had the Committee members been told

[3] Each dockman was assigned a specific checker number which was to be marked on the manifest when he loaded a freight order.

Scullion's number, they would have been able to ascertain from the manifest that Scullion did not load any of the freight. Without knowing Scullion's checker number they would have no way of knowing the truth in this regard.

In addition Scullion also falsely testified at the company level hearing that once Dushaw "got the two Fab Center skids off he didn't have to rework the trailer". Roadway depended greatly upon Scullion's contentions in justifying Dushaw's discharge. The grievance committees had a copy of the loading manifest, but the diagram on the copy was not legible. No explanatory evidence was provided.

A legible copy of the diagram accompanied by testimony explaining its significance provided crucial evidence to the district court. The legible diagram reveals the location of each freight order Dushaw carried. According to the diagram each of the freight orders Dushaw passed over was loaded close to the nose of the trailer and was not accessible unless he delivered or unloaded significant amounts of the other freight first.

The evidence at trial, including the legible manifest, combined with the revelation of Scullion's number, convinced the district court that Scullion loaded none of the freight in question and that he also lied when he indicated Dushaw could have easily unloaded the freight. The court also concluded that Scullion's testimony was knowingly and falsely made.

B. PROCEEDINGS IN THE DISTRICT COURT

Petitioner brought this action against Roadway and the union on November 4, 1987 alleging violations of Sect. 301 of the Labor Management Relations Act of 1947, (29 U.S.C. Sect. 185). He alleged that Roadway violated the collective bargaining agreement by discharging him from employment after a twenty-one (21) year career as a truck driver for Roadway. He also alleged that the union breached its duty of fair representation by handling the grievance challenging his discharge in a discriminatory, arbitrary, and bad faith manner. Petitioner sought injunctive relief, lost wages, lost fringe benefits, compensatory damages, punitive damages, and reasonable attorneys fees.

Petitioner's case proceeded to trial before the district court without a jury. A detailed Memorandum and Order was issued by the district court on January 3,1992 wherein the court decided the liability aspects of the case. (A-17 to A-87) The district court meticulously analyzed and reviewed the evidence, making numerous credibility resolutions, finding that Roadway breached the collective bargaining agreement and that the union breached its duty of fair representation, which breach significantly tainted the grievance decision. Several additional district court decisions followed on the issue of damages. The district court eventually awarded Petitioner $128, 489.19 in back pay and fringe benefits, $160,781.25 in attorney fees and $100,000.00 in punitive damages. All but the punitive damages were apportioned between the union and Roadway according to their relative fault. The punitive damages were awarded solely against Roadway.

C. PROCEEDINGS IN THE COURT OF APPEALS

Roadway and the union appealed. Petitioner cross appealed. The court of appeals for the sixth circuit reversed the district court's decision on September 27, 1995. (A-1 to A-13). In this decision the court of appeals assumed arguendo that the union breached its duty of fair representation by acting in a bad faith, arbitrary or discriminatory manner in handling Petitioner's grievance. The reversal was based solely upon the court of appeals' conclusion that there was no evidence that union's breach "tainted" the results of the grievance procedure. Petitioner sought a Rehearing and suggested en banc consideration. On December 1, 1995 the court of appeals denied Petitioner's Petition for Rehearing. (A-14.) In so doing the court of appeals noted that the question of "taint" was a "very close question".

REASONS RELIED ON FOR ALLOWANCE OF A WRIT

I. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME

IMPORTANT MATTER, AND CONFLICTS WITH SEVERAL RELEVANT DECISIONS OF THIS COURT, AND DECIDES AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

A writ of certiorari should be granted in this case because the court below decided federal questions in a way which conflict with a decision of another united states court of appeals on the same important matter. It also conflicts with several relevant decisions of this court. Moreover, one of the questions presented here - the burden of proof in a hybrid/301 action - is an important question of federal law that has not been, but should now be resolved by this Court. As to another question presented here - the proper application of the clearly erroneous standard - the decision below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory powers.

A. THE BURDEN OF PROOF IN HYBRID/301 ACTIONS

In the landmark case of Vaca v. Sipes, 386 US 171,182 (1967), Justice White characterized the duty of fair representation as the "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." This Court has repeatedly characterized the duty in the same way. Breininger v. Sheet Metal Workers Int'l Assoc., Local Union No. 6, 493 US 67, 87 (1989); DelCostello v. Int'l Brotherhood of Teamsters, 462 US 151, 165 n. 14 (1983); Bowen v. U.S. Postal Service, 459 US 212, 240 (1983), White, J. (concurring in part and in dissenting in part); Abood v. Detroit Bd. of Educ., 431 US 209, 221, n. 15 (1977); Hines v. Anchor Motor Freight, 424 US 545, 564 (1975); NLRB v. Allis-Chalmers Mfg. Co., 388 US 175, 181 (1967).

Unfortunately, in practice, the "bulwark" has operated far more to protect employers from their workers, rather than to protect those workers from their

unions. Goldberg, "The Duty of Fair Representation: What the Courts Do in Fact", 34 Buff L. Rev. 89,158 (1985) Professor Goldberg points out that Petitioners have prevailed on less than 5% of DFR cases. Id. at 157 While those odds hardly amount to a bulwark, any remaining prospects of justice for wrongfully discharged union employees will be seriously eroded if the court of appeals decision in this case is left standing.

1. Is A Discharged Employee Required to Prove Taint?

In Vaca the Court crafted the hybrid/301 cause of action, which is the basis for the instant case. Vaca fashioned a rule requiring proof of two elements in order for a Plaintiff to successfully obtain a remedy in such a case: if the employee successfully proves that 1) the union breached its duty of fair representation; and 2) the employer breached the contract, the trial court is obligated to fashion an appropriate remedy. Vaca, at 187.

Vaca was followed closely by Hines v. Anchor Motor Freight, *supra*. The Hines

Court reiterated the two elements of proof developed in Vaca and noted that this requirement placed a "substantial" burden of proof on employees. Hines at 570. This is because in order:

> To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract, they must also carry the burden of demonstrating the breach of duty by the Union. Id. at 570-571.

The Hines Court sought to protect the rule of arbitraral finality on the one hand, yet provide justice to injured employees on the other. In order to reach an appropriate balance between these competing interests the Court opined that:

> The finality rule has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest

> that erroneous arbitration decisions must stand even though the employees' representation by the Union has been dishonest, in bad faith, or discriminatory; for in that event error an injustice of the grossest sort would multiply. Id. at 571.

The Hines Court equated the duty of fair representation with the "minimal level of integrity" that must be present in the contractual machinery if the finality rule is to be applied. Id at 572. The entire thrust of Hines is that whenever the union breaches its duty of fair representation an unacceptable malfunctioning of the grievance machinery results, necessitating departure from the rule of arbitral finality. The Court held that the Hines petitioners were entitled to a remedy if they could prove "an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee." Id. at 572. That "taint", however, is inherent in the union's breach of the duty.

According to Bowen v. U.S. Postal Service, *supra*,the issue Hines and Vaca was "whether proof of a breach of the duty of fair representation would remove the bar of finality from an arbitral decision." The Bowen Court noted that in both Hines and Vaca, the Court answered that question in the affirmative. A contrary rule would prevent the employee from recovering, even in circumstances where it is shown that a "Union manufactures evidence and knows from the start that it is false." Under these circumstances it would be unjust to prevent the employee from recovering. Bowen, at 223 citing Hines, at 570.[4]

Most of the courts of appeals which have considered this issue, including the court in this case, have read the "taint" language in Hines to add a third element of proof in a hybrid/301 claim, i. e. taint. See e.g. Wood v. International Brotherhood of Teamsters, 807 F. 2d 493,501(6th Cir. 1986); Thomas v. Bakery, Etc.,Wkrs. Union Local No. 433,826 F. 2d

[4]Ironically, the example cited in Hines and Bowen is quite similar to what occurred in this case and brings to mind the ancient Biblical command "justice, justice thou shalt pursue."

755, 758 (8th Cir. 1987); Hardee v. N.C. Allstate Services, Inc., 537 F. 2d 1255, 1258(4th Cir. 1976); Landry v. The Cooper/T. Smith Stevedoring Co., 880 F.2d 846, 852 (5th Cir. 1989); Thomas v United Parcel Service, Inc., 890 F. 2d 909, 915 (7th Cir. 1989)

As a result of these courts of appeals decisions, not only must a plaintiff now prove a breach of contract and a breach of the duty of fair representation, as required by Vaca and Hines but, in addition, the employee must prove that the Union's breach of its duty, "tainted" the workings of the grievance procedure. Such a requirement would throw the carefully crafted balance between arbitral finality and individual rights, already heavily weighted in favor of finality, completely out of kilter.

Most courts of appeals have now had the opportunity to consider this issue. As noted above most, if not all, have held that the third element of taint must be proved. However, this Court has never had the opportunity to consider this issue. The addition of a third element of proof i.e. taint, makes what was already a

substanial burden of proof, simply too onerous.

This Court should take this opportunity to consider the way in which its language in Hines has been misinterpreted by adding the additional element of taint to a hybrid/301 suit. The issue has surely ripened sufficiently by now to warrant the Court's resolution of this question.

2. What Proof Must Be Presented To Satisfy the Taint Requirement, If It Is Required?

Assuming arguendo that the third element of "taint" is required, it is far from clear what evidence should be necessary in order to prove it. Vaca, Hines, and their progeny suggest that the same evidence offered to prove the breach of the duty is sufficient to prove taint. The court of appeals decision in this case holds that additional, independent evidence must be presented to prove taint.

The court of appeals decision, in effect, requires that testimony must be presented from the "arbitrators", (in this case a joint committee), indicating that a

different result would have occurred had the union not breached its duty. This would make it virtually impossible for a wrongfully discharged union employee to ever prevail.

In a joint committee grievance procedure the decision is rendered by a committee made up of equal numbers of union and management representatives whose loyalties are owed to the union and management, not the discharged former employee. It is unrealistic to expect that a majority of the joint committee would ever testify that they would have decided the case differently, had it not been for the union's breach. Such evidence would be the only evidence that could have satisfied the standard set by the court of appeals in this case. To require such direct, independent evidence of taint, is to make it impossible, as a practical matter, for a Vaca Plaintiff to ever succeed.

There are also significant legal obstacles. The doctrine of arbitral immunity is a long standing adjunct to the doctrine of judicial immunity. Bradley v. Fisher, 80 U.S.(13 Wall) 335 (1872). It has often been applied by the

lower courts to arbitrators acting in a quasi judicial role . Intern. U., United Auto Wkrs. v Greyhound Lines, 701 F2d 1181, 1185-1186, (6th Cir. 1983);Cahn v. International Union Ladies' Garment Workers Union, 311 F 2d 113, 114-115 (3rd Cir. 1962) (per curiam). Joint committee members have generally been treated as arbitrators. Teamsters Freight Employees vs. Bowling Green Express Inc., 707 F 2d 254, 256(6th Cir. 1983), citing General Drivers Local 89 vs. Riss & Co., 372 U.S. 517 (1963); Thomas v. United Parcel Service, Inc., *supra* at 922.

A corollary to immunity from suit is immunity from testimony. Arbitrators, like judges, are immune from providing testimony about the reasoning they employed in reaching their decisions. Fukaya Trading Company, S.A. v. Eastern Marine Corp. , 322 F. Supp. 278 (E.D. La. 1971) Petitioner would have been legally barred from presenting testimony about the reasoning of the "arbitrators", the only witnesses who could have known whether they would have reached a different result absent the union's breach. The lower court's requirement that Petitioner must present such testimony to prove taint

imposes an impossible requirement upon Vaca Plaintiffs. This would thoroughly eviscerate any chance that the duty of fair representation would ever act as the bulwark against arbitrary union conduct as has consistently been envisioned by this Court.

If proof of taint is required, the same proof offered to show a breach of the duty should be sufficient to satisfy that requirement. Further, proof by inference, should suffice. A discharged employee should not be required to prove this element by direct proof.

In Thomas v. Bakery, Etc.,Wkrs. Union Local No. 433,*supra*, at 263 the court held that even if the arbitrator had all of the facts before him, the arbitral process could be tainted and was. In the instant case, the court of appeals held just the opposite, determining that because the joint committee allegedly heard "both sides of the story" and saw the relevant documents, taint had not been proven. (A-13)

This conflict between the Circuits warrants resolution by this Court. Consideration by this Court is also necessary to clarify what evidence is

needed to prove taint. This is an issue which has not been, but should be decided by this Court, assuming proof of taint is necessary.

B. THE CLEARLY ERRONEOUS STANDARD

The court of appeals decision turned solely upon the determination that the district court's was clearly erroneous in making a factual finding that the union's breach of its duty of fair representation tainted the grievance proceedings. In reaching this decision the court of appeals inappropriately substituted its judgment for that of the district court and deviated from a recent decision of this Court setting the permissible parameters of the clearly erroneous standard.

This Court's landmark decision on this subject is Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985). The district court in Anderson made detailed factual findings of sex discrimination and ordered judgment for the Petitioner. The court of appeals reversed, because the district court's crucial factual findings were "clearly erroneous". This Court

reversed because the court of appeals inappropriately substituted its view of the evidence for that of the proper fact finder, the district court. The Court analyzed the clearly erroneous standard as follows:

> The clearly erroneous standard is a very strict one. It does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently ... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly

erroneous. Anderson at 573-574

The Court went on to note:

> when a trial judge's finding is based on his decision to credit the testimony of one of the two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.
>
> Id. at 575 (citations omitted)

While the court of appeals superficially paid lip service to Anderson, in truth, it did precisely what it forbade. The district court's findings were based upon numerous credibility determinations. The court overturned the district court's decision with virtually no anlysis of the evidentiary underpinnings of that decision. The court never made a finding that the witnesses who the district court credited had told

incoherent or facially implausible stories. Nor did the court find that the stories of the credited witnesses were contradicted by extrinsic evidence or internally inconsistent. Without such findings the clearly erroneous standard cannot be met. Anderson, supra, at 575.

The court of appeals simply substituted its judgment for that of the fact finder. The court overturned the district court's decision even though it conceded in denying rehearing that it was a "very close question on the question of taint". (A-15) In so doing the court far "overstepp(ed) the bounds of its duty under Rule 52(a). Anderson, *supra,* at 573.

As such, a petition for a writ of certiorari should be granted to address this important issue which was decided by the court of appeals in a way which is in conflict with the relevant decisions of this Court so to secure and maintain uniformity of decisions and predictability in this important area of law. In addition, the court of appeals so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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January, 1996

APPENDIX

RECOMMENDED FOR FULL - TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1995 FED App. 0295P (6th Cir.)
File Name: 95a0295p.06
Nos. 92-4281, 92-4282 and 92-4295

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT DUSHAW, *Plaintiff-Appellee, Cross-Appellant,*	)
	) ON APPEAL from the United States District Court for the Northern District of Ohio
v.	)
ROADWAY EXPRESS, INC., and TRUCK DRIVERS UNION LOCAL 407, *Defendant-Appellants, Cross-Appellees.*	)

Decided and Filed September 27, 1995.

Before: KENNEDY, WELLFORD, and SILER, Circuit Judges.

SILER, Circuit Judge. Defendants, Roadway Express, Inc. ("Roadway") and Truck Drivers Union Local 407 ("Union"), appeal the district court's judgment and challenge the amount of damages and fees assessed against them for, respectively, breach of a collective bargaining agreement and breach of the duty of fair representation with regard to the discharge of plaintiff Robert Dushaw. Dushaw cross appeals, challenging the court's denial of reinstatement and front pay. For the reasons stated herein, we reverse.

I.

Dushaw was a driver for Roadway and a member in good standing of the Union at the time of his discharge. He was the Union's elected shop steward from 1982 until his discharge. As shop steward, he reviewed grievances filed by other employees, forwarded those grievances to the Union's business agent, and attended employees' grievance hearings with the business agent. Although the Union

claims that the business agent, not the steward, is solely responsible for representation of the employee in grievance proceedings, the record shows that the business agent relied on the steward for much of the information necessary to provide effective representation.

In his second re-election as steward, Dushaw defeated Ken Scullion, who had been supported by Richard Sanzo, the Union's business agent. Sanzo appointed Scullion alternate shop steward, and often asked Scullion rather than Dushaw to come to the grievance hearings. Sanzo felt that Dushaw was too vocal and antagonistic at the hearings. Sanzo urged Dushaw not to run for re-election and warned him that he would be fired if he continued as steward.

Sanzo's dislike of Dushaw was shared by many of the Roadway supervisors and Union members, who claimed that Dushaw was a "bad employee." Dushaw's supervisors wrote him up for numerous minor incidents. One supervisor wrote that "Dushaw has no interest in improving his work habits. We will start putting pressure on him and start hanging paper

on him for every wrong move." Another wrote that Dushaw "is a snake and has to be watched at all times ... We get him, and our jobs will be much easier."

On April 5, 1987, Roadway notified Dushaw that it would be conducting a hearing to discuss his overall work record and an incident that occurred on the Beachwood delivery route. At the hearing, the company considered a number of minor incidents, such as Dushaw's failure to clean out his truck, reporting to work five minutes late, and failing to call in a delay at one of his stops. The company's decision to discharge Dushaw, however, was based primarily on the Beachwood incident and the Gray Drug incident.

The Gray Drug incident involved a delivery made to Gray Drug on March 4, 1987. Dushaw arrived at the Gray Drug warehouse shortly after 9:30 a.m., but due to the number of trucks occupying the unloading doors and waiting to unload, he was not assigned an unloading door until 11:00 a.m. Gray Drug, in objecting to being charged for the delay, stated in a letter to Roadway that Dushaw had been assigned a loading door at 9:55 a.m., and

that the delay in unloading was caused by Dushaw. Although there is evidence that Dushaw called the Roadway dispatcher to inform him of the delay, Roadway accused Dushaw of failing to report in properly and of falsifying his daily log with respect to the delivery.

The Beachwood incident occurred on April 20, 1987, the day before the hearing. On that day, Dushaw was assigned the Beachwood delivery route. He experienced trouble accessing freight at one stop, apparently because the freight either was loaded improperly or had shifted in transit. Dushaw claims that he informed the dispatcher of the problem and that he would skip a half dozen stops and return to them later in the day, when he could more easily access the freight for those stops. A Roadway supervisor was "tailing" Dushaw that day, allegedly looking for Dushaw to make mistakes. Roadway accused Dushaw of failing to make all of his assigned deliveries because of his unwarranted deviation from the delivery schedule.

At the company level hearing, Dushaw was represented by Sanzo, and Scullion was present as alternate shop

steward. With respect to the Gray Drug incident, Roadway presented the letter from Gray Drug stating that Dushaw was assigned an unloading door at 9:55 a.m. Dushaw and Sanzo presented Dushaw's version of the facts. Apparently, the main complaint Dushaw had with Sanzo's representation at this hearing was that he failed to call Mr. Sartain, one of the dispatchers, to corroborate Dushaw's story. However, when Dushaw was asked, later in the proceedings, whether Sanzo had presented all of the arguments he (Dushaw) wished to have presented, he answered affirmatively.

During the course of the company level hearing, Scullion was questioned about the Beachwood incident. He stated that the truck had been properly loaded that day, and that Dushaw would not have had any valid reason for skipping stops on his delivery route. A number of minor incidents were also discussed at the hearing, but it is undisputed that Roadway relied heavily on the Gray Drug and Beachwood incidents in firing Dushaw.

After Roadway discharged Dushaw, the Union filed a grievance with the Cleveland Joint Committee and another

hearing was conducted. Sanzo again represented Dushaw. Scullion was not present, although his testimony at the company level hearing was presented by Roadway. Dushaw gave his version of the story. Roadway presented maps, charts, and the manifest that listed in detail the loading of the truck and the delivery route used by Dushaw with regard to the Beachwood incident. The company again alleged that, in the Gray Drug incident, Dushaw had been assigned a door at 9:55; Dushaw stated that Gray Drug had corroborated his version of the story, admitting that it had made a mistake. Gray Drug ultimately retracted the portion of the letter accusing Dushaw of being assigned an unloading door at 9:55, but the retraction letter had not yet been sent to Roadway. At no point, however, did Gray Drug withdraw its request to Roadway not to send Dushaw back to its facility because of its dissatisfaction with his services. In any event, Dushaw presented his story and the results of his efforts to interview corroborating witnesses at this hearing as well as at the subsequent state hearing. The Cleveland Joint Committee

deadlocked on the issue of whether Roadway had good cause to discharge Dushaw, so the Union pursued a grievance up to the State Joint Committee.

The issues raised before the State Committee were essentially the sameas those raised at the Cleveland hearing. It was at this hearing that Dushaw testified that he was satisfied with Sanzo's representation and that he had been given the opportunity to present all arguments he wished to present to the committee. The State Committee unanimously found that Roadway had good cause to terminate Dushaw.

Dushaw then filed this "hybrid s 301" action. See 29 U.S.C. s 185 (Section 301 of the National Labor Relations Act). Two years after the testimony was concluded in the bench trial, the district court found for Dushaw. It found that, because of the antipathy shared toward Dushaw, Roadway had targeted Dushaw for termination and had discharged him without just cause. Because the collective bargaining agreement provided that Roadway "shall not discharge nor suspend any employee without just cause[,]" the court

concluded that Roadway had breached the collective bargaining agreement.

The court, citing *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 309-10 (6th Cir.1975), also found that the Union had breached the duty of fair representation by failing "to treat Dushaw 'without hostility or discrimination;' to assert Dushaw's rights 'in complete good faith and honesty;' and to 'avoid arbitrary conduct.' " It found that the Union's conduct "significantly tainted the grievance proceedings to the extent that but for such conduct, it is more likely than not that a different result would have ensued." The court awarded damages and attorneys' fees to Dushaw and assessed punitive damages against Roadway.

II.

In order to recover from either the Union or Roadway, Dushaw must prove both breach of the collective bargaining agreement by Roadway and breach of the duty of fair representation by the Union.

Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 585 (6th Cir.1994). To prove breach of the duty of fair representation, Dushaw must show that the Union's actions were either arbitrary, discriminatory, or in bad faith. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51 (1991). Once a plaintiff proves that the Union acted in bad faith or in an arbitrary or discriminatory manner, however, the plaintiff must also prove that the Union's actions tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach. Black, 15 F.3d at 585. Moreover, the impact of the Union's breach on the outcome of the grievance proceeding must have been substantial:

> to establish a breach of fair representation, the plaintiff must meet the onerous burden of proving that the grievance process was "seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct."
>
> *Id.* (citation omitted).

The district court's determinations that the Union acted arbitrarily, in a

discriminatory manner, and in bad faith, and that, but for such action the outcome of the grievance procedure would have been different, are factual findings, which we review for clear error. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Findings of fact are clearly erroneous if, viewing the evidence as a whole, this court is left with "the definite and firm conviction that a mistake has been committed." *Id.*

Assuming, arguendo, that the Union acted in bad faith or in anarbitrary or discriminatory manner, we find no evidence to support a findingthat such actions tainted the grievance procedure.[1] As for Scullion'salleged falsifications against Dushaw at the company level

[1] Dushaw's argument that Sanzo failed to raise the issue of timeliness of the letter of investigation regarding the Gray Drug incident, however, fails to meet the first test in that the failure was caused, at most, by negligence, which falls short of arbitrary, discriminatory, or bad faith action. See *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73, 110 S.Ct. 1904, 1911, 109 L.Ed.2d 362 (1990).

hearing, [2] Dushaw was allowed to present his version of the story, and, more importantly, the ultimate decision to affirm Dushaw's discharge was made by a committee who had heard both sides of the story and had seen the manifest and records refuting Scullion's statements. As for Sanzo's failure to raise certain issues or call certain witnesses, Dushaw admitted at the state level hearing that he had had an opportunity to present all issues he wished to present. Moreover, in contrast to cases in which missing evidence would have caused the employer to reconsider a decision to discharge the employee, there is no indication that the Union failed to present evidence that "probably would have brought about a different decision" in the grievance proceeding. See *Black*, 15 F.3d at 585 (citation omitted).

The district court's finding of taint is clearly erroneous. Without proof that the grievance proceeding was tainted, Dushaw's hybrid s 301 action must fail.

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[2] We decline to address whether Scullion's statements are attributable to the union, but assume for purposes of this analysis that they are.

See id. Discussion of additional issues raised on appeal is, therefore, unnecessary.

REVERSED.

Nos. 92-4281/4282/4295

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT DUSHAW,	)	
	)	
Plaintiff-Appellee/	)	
Cross-Appellant,	)	
	)	
	)	
	)	
v.	)	ORDER
	)	
	)	
ROADWAY EXPRESS, INC., and	)	
TRUCK DRIVERS UNION	)	
LOCAL 407,	)	
	)	
	)	
Defendants-Appellants/	)	
Cross-Appellees.	)	

Before: KENNEDY, WELLFORD and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition

having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition and concludes that the opinion filed on September 27, 1995 should be revised. Accordingly, the following separate writing is hereby inserted at the end of the opinion:

HARRY W. WELLFORD, Circuit Judge.

I write with respect to the panel's denial of a rehearing only to emphasize that this case presents a very close question on the question of taint as a consequence of Scullion's mistaken or false testimony. The taint, if any, however,in my view, as expressed by our opinion in light of the entire record, did not affect the ultimate outcome. In any event,I think it also appropriate to point out that plaintiff would be entitled, at most, to appropriate compensatory damages only after mitigation,and to reasonable attorney fees. The award by the district court which included improper punitive damages and exorbitant fees and interest would have been set aside.

In all other respects, the petition for rehearing en banc is denied.

ENTERED BY ORDER OF THE COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT DUSHAW,	)	Case No. C87-3279
	)	
Plaintiff,	)	
vs.	)	
	)	MEMORANDUM
ROADWAY EXPRESS,	)	
INC., et al.	)	AND ORDER
	)	
Defendants.	)	

ALDRICH, J.

Robert Dushaw brought this action against Roadway Express, Inc. ("Roadway") and Local 407 of the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America ("the Union"), alleging violations of s 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. Sect. 185(a). [1] Dushaw

[1]Dushaw also sued Gray Drug Fair, Inc., Joe Maruniak, and Marshall Drug Company for defamation and intentional interference with Dushaw's contractual

alleged that Roadway terminated his employment in violation of his collective bargaining agreement, and that the Union breached its duty of fair representation by the manner in which it pursued his grievance. The Court conducted a bench trial [2] on the issue of the liability of Roadway and the Union, and it now issues its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52. For the following reasons, the Court finds that Dushaw has met his heavy burden of establishing both a breach of the collective bargaining agreement by

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and the Union. Before trial, Dushaw and these defendants reached a settlement of these claims.

[2]The law was not settled concerning whether Dushaw was entitled to a jury trial, and the parties accordingly agreed to try the case to the Court. See Black v. Ryder/P.I.E. Nationwide, Inc., 930 F.2d 505 (6th Cir.1991).

Roadway and a breach of the Union's duty of fair representation.

FINDINGS OF FACT

Dushaw is a United States citizen and an Ohio resident. At all relevant times, Roadway was an employer that engaged in interstate commerce, and the Union was a labor organization engaged in the representation of employees in an industry affecting interstate commerce.

Roadway operates a trucking business. It employed Dushaw as a city delivery driver from February 24, 1966, until April 21, 1987. Dushaw worked out of Roadway's Cleveland terminal. During his employment, Dushaw was a member of the Union. It is undisputed that Dushaw was a member in good standing of the Union at the time of his termination. Dushaw was

also the Union's elected shop stward from 1982 until his discharge.

The Union is the duly authorized collective bargaining representative for Roadway's employees at the Cleveland terminal. The employees' collective bargaining agreement is memorialized by three documents: the National Master Freight Agreement ("Freight Agreement"), the Central States Area Local Cartage Supplemental Agreement ("Supplemental Agreement"), and the Ohio Addendum.

The Supplemental Agreement provides that an employer may not discharge or suspend an employee "without just cause." The Supplemental Agreement also requires that, prior to any discharge or suspension of an employee, the employer must provide at least one written "warning notice" to that employee, and must send copies of the

warning notice to the local union and the appropriate shop steward. Furthermore, the Supplemental Agreement states that

> [w]arning letters must be postmarked no later than ten(10) days following the Employer's knowledge of the violation, except in those cases where a letter ofinvestigation was issued within such ten (10) day period. Letters of investigation for accidents shall be valid for forty (40)calendar days from the date of the accident.

The Supplemental Agreement also bars employers from using warning letters that are more than nine months old as a basis for discharging or suspending an employee.

The Ohio Addendum mandates additional procedures prior to the discharge, suspension, or termination of employees. Subject to certain exceptions not relevant here, an employee is entitled to a hearing, with his union business representative present, prior to any

adverse employment action. The language of the Ohio Addendum makes it clear that a hearing is required in addition to a warning letter before adverse employment action may be taken.

Dushaw claims that Roadway breached these contractual obligations. Before desribing the facts upon which Dushaw relies to substantiate this claim, however, it is helpful to first note the following facts that describe Dushaw's relationship with his union. Dushaw was first elected by his peers to the position of shop steward in 1982. He was re-elected thereafter every time he ran for that office, including 1986. In the 1986 election, Dushaw defeated Ken Scullion. At the same election, Richard Sanzo was elected Business Representative. Sanzo, who was a fully candid and credible

witness, testified that he did not like Dushaw. Sanzo admitted that he had told Dushaw not to run for re-election as shop steward, and had told Dushaw that if Dushaw ran for re election, Dushaw would get fired. Sanzo testified that he did not like the way Dushaw did his job as shop steward and that he thought Scullion would make a better shop steward than Dushaw.

Sanzo also testified that after the 1986 election, in which Dushaw had defeated Scullion for the position of shop steward, he unilaterally named Scullion as alternate shop steward. Sanzo knew that Scullion and Dushaw did not like each other. The evidence demonstrates that several Roadway drivers told Sanzo that they were also unhappy with Sanzo's appointment of Scullion. These drivers

wanted to hold an election for the position of alternate shop steward. Sanzo, however, appropriately advised these drivers that, as business representative, he had the right to appoint his choice of an individual to the position of alternate shop steward.

One of the normal functions of the elected shop steward was to attend disciplinary hearings, which employees who faced discharge or suspension were given pursuant to the collective bargaining agreement provisions discussed above. At these hearings, Roadway would inform the employee of its reasons for disciplining him. The Union shop steward and business representative would attend the hearings as representatives of the employee, and would normally present the best possible case for the employee to dissuade Roadway

from exercising its prerogative to discipline that employee. Sanzo asserted his preference that Dushaw not be present at these hearings because Dushaw asked too many questions, always took the employee's side in any dispute with management, did not understand how to negotiate with Roadway, and was not liked by Roadway. Therefore, Sanzo would sometimes arrange for Scullion to be present at these hearings instead of Dushaw. There was credible testimony that at a few of the hearings, the employees being disciplined told Sanzo they preferred Dushaw to Scullion and asked Sanzo why Dushaw was not present. Sanzo responded that Dushaw was "an asshole," was "done around here," and that they should think of Scullion as their shop steward from now on. The Court accepts this testimony and finds that

Sanzo had a great deal of animosity toward Dushaw. Apparently, Sanzo was not the only person who disliked Dushaw. For example, Roadway Operations Manager Dennis Dodge admitted in testimony that he wrote, in exhibits 111, 113, and 114, that Dushaw was a "snake" and that Roadway should "get rid of him." Dodge testified that he later changed his mind, and that they didn't have to "get" Dushaw--Dushaw would "get himself" if Roadway just watched Dushaw carefully, and "he'd make his own mistakes." As will become apparent, many other Roadway supervisors and Union members shared this antipathy toward Dushaw.

Against this background, the following events took place. Beginning in August 1986, after the election, Dushaw received a series of warning letters from

Roadway regarding relatively minor infractions. Roadway held a disciplinary hearing concerning these warning letters on April 21, 1987. These warning letters were as follows:

August 28, 1986: Dushaw was charged for failing to clean out his truck at the end of the day. This warning was later rescinded at the disciplinary hearing.

September 25, 1986: Dushaw was charged with a two minute discrepancy between his driver's log and the time he actually left the Cleveland terminal. He was also charged with failing to clean out scraps of paper from his truck before leaving the yard.

September 26, 1986: Dushaw was charged for not "chalking" a load of tires when making a pick-up from Goodyear Tire

Company. Dushaw protested to Roadway in writing that there existed no policy requiring him to chalk tires; the tires did not need chalking in this instance; and the warning was "just more of the continuing harassment and discrimination because of my union activities." In his testimony at trial, Dushaw explained that when a driver picks up two or more different shipments of tires, the driver is supposed to chalk the number "1" on all the tires in the first shipment, chalk the number "2" on all the tires in the second shipment, and so on. Dushaw explained that he did not chalk any tires because he only picked up one shipment. Dushaw admitted that, if Roadway rules require him to chalk the tires even though there is only one shipment, then he broke this rule.

September 26, 1986: Dushaw was charged for leaving his jacket in his truck and walking to the loading dock, rather than communicating with the dispatcher by two-way radio.

September 26, 1986: Dushaw was charged for not asking a delivery customer whether or not it had a "bank stamp" with which to pay a delivery bill. The warning letter stated that Dushaw had been specifically told by Roadway's dispatcher to ask the customer if it had a bank stamp. Dushaw protested to Roadway in writing that the dispatcher was lying and that the dispatcher had never mentioned anything to him about a bank stamp in connection with that delivery, nor had the customer. In his testimony, which this Court finds credible, Dushaw added that the delivery customer had never before

used a bank stamp in payment, and hadn't since.

September 26, 1986: Dushaw was charged for not calling in a delay of his delivery stops. This warning was later rescinded at the disciplinary hearing.

October 8, 1986: Dushaw was charged for failure to write up the need for fuel for his truck.

November 14, 1986: Dushaw was charged for unauthorized absences. This warning was rescinded at the disciplinary hearing.

February 25, 1987: Dushaw was charged for failing to sign his driver's log. In his testimony, Dushaw insisted that he had signed his driver's log and that he had asked to see the log with the missing signature, but that his request was denied.

March 10, 1987: Dushaw was charged for being "insubordinate" to supervisor Keith Winters. Dushaw protested to Roadway in writing. Although the facts surrounding this event are unclear, Dushaw and Winters apparently exchanged words concerning the appropriateness of Dushaw's taking a coffee break.

March 20, 1987: Dushaw was charged for wasting company time by talking with two individuals who were not delivery customers while making a delivery. He was also charged for not checking behind his truck before backing up. Dushaw protested to Roadway in writing that the two individuals with whom he spoke were Union business representatives who were standing on a picket line. Dushaw also wrote that the charge of not checking behind his truck

was merely brought to harass him. In his credible testimony, Dushaw made it clear that he was not wasting time by talking with these Union representatives. Dushaw also admitted that he had not checked behind his truck before backing up, but gave a credible explanation as to why he felt it was appropriate not to check in this instance--doing so was unnecessary and would have delayed his next deliveries.

March 21, 1987: Dushaw was charged for failing to call in a delay at one of his delivery stops, and for failing to notify the dispatcher of his destination for his next stop. Dushaw protested to Roadway in writing that he was not delayed and that he was "being singled out as to call in and out of every stop when it doesn't apply to all

employees." Dushaw presented credible testimony that if there was any delay, it was due to rearranging freight, and that he was not required to report such a delay.

March 23, 1987: Dushaw was charged with wasting company time by talking with another driver while making a delivery, instead of using the time to rearrange his load. Dushaw protested to Roadway in writing that the load did not need rearranging and that he spoke with the other driver only during the time his delivery customer inspected its delivery. Dushaw presented credible testimony that rearranging the load would have been a waste of time because the nature of the load made it very unstable during transport.

April 3, 1987: Dushaw was charged for failing to notify the dispatcher of a delay at one of his stops. Dushaw protested to Roadway in writing that any delay was necessitated in order to unload freight, pick up a payment check, and examine freight for damage as he had been instructed to do by the Roadway dispatcher.

April 6, 1987: Dushaw was charged for reporting to work five minutes late. In his testimony, Dushaw explained that he and several of his superiors were all late that day due to a highway traffic jam.

April 16, 1987: Dushaw was charged for having committed a "checking error," not making sure that the freight he picked up was listed in the bill of lading. The alleged checking error was

made in connection with a pick-up on July 23, 1986. Dushaw correctly protested in writing that this warning was untimely, coming nine months after the fact.

Dushaw's unrebutted testimony provided credible explanations for all of these incidents, and the Court finds that these incidents, viewed cumulatively or individually, did not provide Roadway with just cause to terminate Dushaw. The Court also finds that Roadway itself did not view the above incidents as significant factors in its reasons for Dushaw's discharge. Rather, Roadway relied heavily on Dushaw's behavior in connection with the "Gray Drug incident" and the "Beachwood delivery route incident" to justify Dushaw's discharge. While Roadway agreed that the above series of warning letters concerned relatively

minor infractions, Roadway insists that the Gray Drug incident and the Beachwood delivery route incident provided it with just cause to terminate Dushaw.

The Gray Drug Incident

On March 4, 1987, Dushaw made a delivery to Gray Drug. According to the trial testimony of Roadway terminal manager Dahmert Banks, Dushaw provided Roadway with just cause for termination because he: (1) took too long to unload the freight at Gray Drug; (2) failed to call in his delay to the Roadway dispatcher, as required; and (3) did not properly enter the delay in his driver's log, as required. The Court, however, finds that Banks' allegations are untrue and that Dushaw's actions in connection with the Gray Drug delivery did not violate any Roadway rule or regulation, or

otherwise provide Roadway with just cause to terminate Dushaw.

Dushaw was assigned to deliver certain freight to the Gray Drug warehouse on March 4, 1987. Dushaw had no other deliveries on that day to unload. Dushaw's driver's log indicates that he left the freight terminal at 9:20 a.m. and arrived at Gray Drug at 9:43 a.m. When Dushaw arrived at the Gray Drug warehouse, there were at least three trailers ahead of him that were being unloaded.

Roadway claims that Dushaw failed to call in this delay to the Roadway dispatcher as required. Dushaw testified that upon his arrival, he immediately radioed the Roadway dispatcher, Doug Sartain, to inform him of the delay. Sartain testified, however, that he received no such call and that normally, a

driver in such a case would be told to go on to his next stops. However, Dushaw testified that Sartain did not tell him to go to his next stops, but instead told him to check out the situation and call back. Dushaw testified that he followed Sartain's directions by asking the Gray Drug loading dock supervisor to estimate how long he would have to wait to unload his trailer. The loading dock supervisor could not provide Dushaw with an estimate of the probable delay, and Dushaw called back to Sartain on the radio to relay this information. According to Dushaw, Sartain then told him to wait to see what happened, and to report back about every half hour with status updates.

Dushaw testified that he called Sartain back every half hour until an unloading door became available at about

11:10 a.m. At that point, Dushaw radioed Sartain to inform him that he had "received" the unloading door. Dushaw then began to unload the Gray Drug freight. Dushaw next contacted Sartain by telephone (not by radio) at 1:00 p.m., to advise Sartain that he was taking his half hour lunch break. Dushaw telephoned Sartain again at 2:40 p.m. to report that the unloading had been completed, but that he could not leave yet because he needed to note down some claim numbers relating to missing or damaged freight.. Finally, Dushaw left the Gray Drug warehouse at 2:54 p.m.

Dushaw's driver's log verifies the two telephone calls to Sartain. Pursuant to Roadway's policy, radio calls are not recorded on a driver's log, but the Court credits Dushaw's testimony about

the radio calls. The Court also credits the testimony of another truck driver, James Ozanich of the ANR Trucking Company, who observed Dushaw make his various calls to the Roadway dispatcher.

Sartain himself could not recall whether Dushaw ccalled in on that day, and th only copies of his dispatcher's log are barely legible. The Court recognizes that the dispatcher's log does not appear to show these calls by Dushaw, but Sartain testified that dispatchers are often too busy to record every call that they receive. In fact, the log also fails to include any radio calls concerning Dushaw's later pick-ups that day, which Sartain admits were made.

After Dushaw completed the unloading at Gray Drug, Sartain sent him to pick up freight at Atlas Plating and at

Boxit. Dushaw was previously unaware of these scheduled pick-ups, and the Court finds no credible evidence that Dushaw was either advised of these pick-ups earlier in the day, or that Dushaw had been told that morning to make these pick-ups instead of waiting to unload at Gray Drug, Roadway's "normal" procedure. The Court finds Dushaw's testimony to be wholly credible regarding the instructions that were given and the communications that took place between Dushaw and Sartain. The Court does not find credible the evidence presented by Roadway that it had just cause to terminate Dushaw for a failure to call in his delay.

Turning to Roadway's claim that Dushaw did not properly log his delay, the Court does not credit the testimony of Roadway terminal manager Banks or Roadway

operations manager Dodge. Each of these men testified that Dushaw "falsified" his driver's log for March 4, 1987 by not properly logging the one and one half hour delay at the Gray Drug warehouse. Dodge testified that Dushaw falsified his driver's log by entering the delay on the ninth line of the log, below the log entry indicating when Dushaw took his lunch break. Dodge stated that Dushaw should have instead entered the delay on the seventh line of the log, to the right of the words "Gray Drug," and above the entry for lunch (which was on the eighth line). Banks testified that the delay should have been entered on the eighth line of the driver's log, below the words "Gray Drug" and above the entry for lunch.

Dodge's and other Roadway supervisors' own actions, however, belie

their claim that Dushaw falsified his log. Dodge testified that he had reviewed Dushaw's driver's log on March 4th or 5th and did not then notice any problems with it. Dodge testified that he spoke with Dushaw about the delay at the time it occurred and asked Dushaw to explain the delay. Dushaw gave credible testimony that he had answered Dodge by telling him the same thing he had reported to Sartain- that the delay occurred upon his arrival at Gray Drug, not before or later. Furthermore, Sartain testified that the initials "D.R." on Dushaw's log indicated that another Roadway dispatcher, Dan Renfle, had acknowledged Dushaw's delay. Thus, by March 5, 1987, Sartain, Dodge, and probably Renfle knew of Dushaw's Gray Drug warehouse delay, and when it occurred. Yet none of them said anything

to Dushaw or anyone else about "falsification" of the log.[3]

Both Dodge and Banks testified at trial that they were "confused" by Dushaw's log into believing that his delay was after, not before, his lunch. But neither witness professed any concern about the log until April 21, 1987, when Dushaw was given a disciplinary hearing. Neither witness ever discussed with Dushaw any ambiguities in the log even though Roadway had sent Dushaw aletter of

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[3]It also must be noted that, under the collective bargaining agreement, Roadway was required to send Dushaw a warning letter or a letter of investigation postmarked within 10 days of the date when Roadway first knew of the alleged violation. Roadway sent Dushaw a letter of investigation dated March 25, which was not postmarked until March 3 However, Roadway had to have known all of the alleged facts at least by March 5.

investigation on March 30, 1987, and even though, according to the collective bargaining agreement, Roadway was thereafter supposed to be investigating the incident.

Accordingly, the Court does not find Roadway's testimony on this issue to be credible. If the driver's log was as improper as Roadway now asserts, then Dodge or Banks or Renfle would have noted that fact soon after the incident, not seven weeks later for the first time at a disciplinary hearing. Moreover, the Court sees no motive for Dushaw to "falsify" his log in the manner suggested. In sum, the Court does not find credible any evidence presented to prove that Roadway had just cause to terminate Dushaw for a falsifying his driver's log.

Finally, the Court cannot credit Roadway's position that Dushaw took too long to unload his freight at the Gray Drug warehouse. The only evidence of such a delay came from a letter from the Gray Drug dock supervisor to Roadway, which stated that Dushaw had been assigned a loading door at 9:55 a.m. However, the dock supervisor's superior later retracted that letter, stating that Dushaw had not been assigned a loading door until 11:00 a.m. In addition, Dushaw gave credible testimony that he encountered difficulties in unloading large boxes of diapers. This testimony was corroborated in part by Ozanich. Simply, the Court does not find credible any evidence presented to prove that Roadway had just cause to terminate Dushaw for taking too long to unload his freight. Furthermore, the Court finds

that Roadway pursued its charge that Dushaw took too long to unload his freight in bad faith. After Dushaw was terminated at his initial disciplinary hearing, he brought a grievance to the "Cleveland Joint Grievance Committee" and the "Ohio State Joint Grievance Committee." [4] These grievance hearings, which were made available pursuant to the collective bargaining agreement, gave Dushaw a chance to contest Roadway's finding of just cause for his termination. Prior to these grievance hearings, Roadway knew that Gray Drug had retracted its first letter. Yet Roadway continued to present the facts at these grievance hearings as though Dushaw had been given an unloading door at 9:55 a.m. At both

[4]Dushaw's hearings in front of these committees are discussed in more detail infra, in the context of his claim that the Union breached its duty of fair representation.

grievance hearings, Roadway presented as facts statements it knew to be untrue.

In sum, the Court finds that Dushaw's activities at the Gray Drug warehouse on March 4, 1987, when viewed either individually or in combination, do not amount to just cause for his discharge. To the extent that Roadway based its discharge of Dushaw on the Gray Drug incident, Roadway breached the collective bargaining agreement's provisions allowing employees to be discharged only for just cause.

The Beachwood Delivery Route Incident

Roadway also contends that it discharged Dushaw because he did not properly follow his Beachwood delivery route on April 20, 1987. Roadway had two means to learn the exact route Dushaw took during his performance of the delivery

route: first, Dushaw regularly reported his location to Roadway's dispatcher; second, as Roadway admitted, Roadway supervisor Keith Winters secretly surveilled Dushaw during his entire workday. Roadway insists that Dushaw's performance was unsatisfactory because he engaged in improper back-tracking and skipping of stops. Roadway states that these two practices are discouraged, but are permitted if the driver, while out on his route, experiences difficulty in delivering the route sequentially. Roadway regulations state that if the driver decides he has to back-track or skip a stop, he must first call his dispatcher and discuss the problem.

Roadway testified that it took disciplinary action against Dushaw because he improperly skipped six stops in the

Mercantile area off Chagrin Boulevard in Beachwood, Ohio. Dushaw testified that he skipped these six stops because he was unable to remove the freight to be delivered at those stops without significant delay, since the freight had been loaded improperly. Dushaw testified that when he went to Fabric Centers, his first stop in the Mercantile area, he was required to unload much of the freight on his trailer before he could even obtain access to Fabric Center's cargo. After unloading the Fabric Center cargo, Dushaw testified that he then had to reload all the other previously unloaded freight. Both Dushaw's and the dispatcher's logs reveal that as a result of these maneuvers, Dushaw took about 25 minutes to deliver Fabric Center's cargo, much longer than it would have normally taken.

Dushaw maintains that he called the dispatcher to report his problems after completing the Fabric Center delivery. Because of the arrangement of the freight remaining in the trailer, Dushaw reasonably expected similar problems to arise at his next few Mercantile area stops. After explaining this, Dushaw testified that he was advised over the radio by Dodge that it was alright if he skipped his next few stops for the moment and instead delivered the freight destined for those stops later in the day, after he had delivered the more accessible freight.

Dushaw's testimony is wholly credible, and the Court rejects Dodge's claim that he never spoke to Dushaw. In addition, the documentary evidence supports Dushaw's position. The

dispatcher's log reveals that Dushaw called from Fabric Centers upon his arrival there and after the completion of his delivery. The dispatcher's log also shows that Dushaw called twice from his next stop, once upon his arrival there and once again after completion of his delivery. Thus, the dispatcher could not have been surprised that Dushaw had skipped several stops. Furthermore, at Dushaw's Cleveland Joint Grievance Committee hearing, Labor Relations Manager Everett Hart stated that "Mr. Dodge tells me [that] when [Dushaw] called in that day ... from the Mercantile area, he told the dispatcher he had to rework his trailer...."

Dodge testified that he had seen Dushaw's trailer that morning and that it was loaded in such a way that Dushaw

should have had no trouble removing any of the freight in its proper order, and that there was so much room in the trailer that Dushaw "could have danced in it." This testimony is contradicted by the diagram entered into evidence which shows how and where the freight was loaded. The diagram demonstrates that all the freight for the six stops which Dushaw felt forced to skip was loaded in the front third of the trailer, and that the trailer was packed tightly. This diagram was prepared by the dock men who loaded the trailer.

The Court does not find credible Roadway's evidence that Dushaw improperly skipped six of his stops during his April 20, 1987 performance of the Beachwood delivery route. On the contrary, the Court finds that Dushaw's decision to skip these stops was reasonable, that Dushaw

properly reported his problem to Roadway, and that Roadway authorized Dushaw to take the action that he did. Roadway did not have just cause to terminate Dushaw for improperly skipping an stops on his Beachwood delivery route.

As to Roadway's contention that Dushaw improperly "back-tracked" during his performance of the Beachwood delivery route, the Court finds these contention to be also without merit. Dushaw gave credible testimony to explain why he made his deliveries in the manner he did. Dushaw testified that he did not know that he was carrying freight for the Shaker Heights Country Club ("SHCC") until he had unloaded the Fabric Center cargo. He also testified that he did not know exactly where SHCC was located.

Roadway contends that if Dushaw was unfamiliar with his route, he should have requested a map before leaving the Roadway terminal. However, Dushaw was not unfamiliar with the route, only with the specific location of SHCC. Dushaw gave credible testimony that drivers usually do not know where each of their stops will be until they get out on their route. Dushaw also explained that he normally was given a different delivery route, and that he had not driven theBeachwood delivery route in nearly six months. Roadway confirmed that drivers often do not know where each of their stops will be until they have left the truck terminal. Thus, Roadway's contention is absurd. Dushaw cannot be required to request a map before departing in order to find a location that he did not know he would be looking for.

Furthermore, Dushaw testified that at one point he called the dispatcher to report that his next stop was SHCC, but that he was unsure of where SHCC was located. Both Dushaw's and the dispatcher's logs confirm that this call was made. Dushaw testified that he was told by the dispatcher to head west on Chagrin Boulevard, and that he would be called back soon with more detailed information. Dushaw then testified that Dodge called him back to tell him that the SHCC retail shop was closed for the day so that no delivery could be made. Dushaw then proceeded to his next stop. This mid-course change, along with having to skip six stops in the Mercantile area, caused Dushaw to back-track. Dodge denies making any call to Dushaw informing him that the SHCC retail shop was closed,

but the Court does not find Dodge's testimony to be credible. Documentary evidence supports Dushaw's version of his communications with Roadway. The freight bill for SHCC includes a dispatcher's note showing the SHCC telephone number and the directions to SHCC coming from Dushaw's position. Another note indicates a telephone call to SHCC was made the next day to determine when delivery could be made.

As to Dushaw's failure to ever deliver freight to the six stops he had skipped in the morning, Dushaw testified that he returned to the Mercantile area later in the day and made one of his six missed deliveries. Thereafter, however, he called his dispatcher as required and was told instead to pick up freight at a nearby location and to then return to the

terminal. Dushaw's testimony is corroborated by his driver's log, and his testimony is wholly credible. The Court does not accept as credible any evidence that Dushaw purposefully skipped six stops without Roadway's understanding or directions, or in any way contrary to Roadway regulations. Dushaw properly complied with Roadway procedures and with the specific instructions he received on April 20, 1987. The Court finds it odd that Roadway just happened to direct another employee to follow Dushaw during this entire work day, when Dushaw's freight was loaded in such an unusual manner, and that these events occurred very shortly after the Gray Drug incident.

Viewed cumulatively or individually, no action of Dushaw in connection with his performance of the

Beachwood delivery route provided Roadway with just cause to terminate Dushaw. Dushaw neither back-tracked nor skipped stops inappropriately. To the extent that Roadway based its discharge of Dushaw on the Beachwood delivery route incident, Roadway breached the collective bargaining agreement's provisions allowing employees to be discharged only for just cause.

In sum, the Court finds no credible evidence that Roadway terminated Dushaw for just cause. The Court now turns to the evidence adduced at trial concerning Dushaw's claim that the Union breached its duty of fair representation.

Breach of Fair Representation Claim

On or about April 13, 1987, Roadway provided Dushaw with a notice of a disciplinary hearing to be held on April 15, 1987. The disciplinary hearing was to

consider Dushaw's overall work record for the previous nine months, including the facts surrounding Dushaw's delayed delivery at the Gray Drug warehouse on March 4, 1987. On April 17, 1987, Roadway issued a revised notice, stating that the hearing was rescheduled to take place on April 21, 1987. It just so happens that this rescheduled hearing was set to take place one day after the Beachwood delivery route incident. On April 20, 1987, the day of the Beachwood delivery route incident, Roadway issued an additional notice indicating that the next day's disciplinary hearing would also consider the Beachwood delivery route incident. In its April 20 notice, Roadway stated that Dushaw's activities of that day amounted to an "act of dishonesty," although it subsequently withdrew that allegation.

Copies of these notices were provided to the Union and to the Union business representative, Richard Sanzo, as required by the collective bargaining agreement.

The April 21, 1987 disciplinary hearing was the first of a three-step process. The three-step process is outlined in the collective bargainin agreement. At the first stage of this process ("the company level"), Roadway made its initial determination that Dushaw would be terminated. The Union then filed a grievance on Dushaw's behalf, and the grievance was heard by the Cleveland Joint Grievance Committee. The Cleveland Joint Grievance Committee deadlocked on whether Dushaw's termination was improper, so Dushaw's claim was referred to the Ohio State Joint Grievance Committee. The Ohio State Joint Grievance Committee

unanimously denied Dushaw's grievance and upheld his termination.[5]

At the April 21, 1987 company level hearing, both Sanzo and Scullionappeared on behalf of the Union to represent Dushaw. Roadway was represented by Terminal Manager Banks, Operations Manager Dodge, and Labor Relations Manager Hart. Banks ultimately decided to discharge Dushaw based on the series of warning letters he had received and, more significantly, on the Gray Drug and Beachwood delivery route incidents.

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[5] Subsequently, Dushaw attempted to reopen his case in order to put on additional evidence. The Cleveland Joint Grievance Committee again deadlocked on whether Dushaw should be allowed to present new evidence. The Ohio State Joint Grievance Committee then decided to review the new evidence, but unanimously agreed to adhere to its original ruling.

Hart testified that although Scullion represented Dushaw at the disciplinary hearing, Scullion presented evidence against Dushaw concerning the Gray Drug and Beachwood delivery route incidents. According to Hart, Scullion stated that he, Scullion, had helped load the freight in Dushaw's trailer on the day of the Gray Drug incident and that all the freight was loaded on wooden pallets, or "skids." However, the delivery loading manifest for March 4, 1987, the date of the Gray Drug incident, which lists the employees who loaded Dushaw's freight, makes it clear that Scullion loaded little of Dushaw's freight that day. Other trial testimony confirms Scullion's limited role in loading Dushaw's trailer that day.

Hart testified that Scullion had also stated at the company level hearing that

he, Scullion, had loaded a great deal of the freight onto Dushaw's trailer on the day of the Beachwood delivery route incident. Scullion also stated at this initial hearing that Dushaw could have unloaded his freight properly in the Mercantile area, without skipping stops. Hart's testimony was confirmed by Dodge and Banks.

At the Cleveland Joint Grievance Committee and Ohio State Joint Grievance Committee hearings, Hart reiterated all of Scullion's statements. Some of the panelists at these hearings wanted to check Scullion's statements, having noted that the delivery loading manifest showed code numbers for fourteen different people who had loaded Dushaw's trailer. These panelists asked Hart what Scullion's code number was. This question was never

answered. In fact, the evidence at trial revealed that contrary to Scullion's and Roadway's prior assertions, Scullion loaded none of the freight in question. Attempting to explain this contradiction at trial, Banks testified that although Scullion didnot actually load any freight, Scullion had been on "miscellaneous dock duty" that morning and had checked the trailers before they left the terminal. Even if Banks' testimony is true, the Court finds that Scullion's statements, upon which Roadway relied at all three levels of its proceedings against Dushaw, were made falsely and in bad faith. Scullion's statements were especially harmful to Dushaw because they came from the very person who was supposed to be acting as Dushaw's Union representative.

Scullion was not the only Union representative who failed to adequately represent Dushaw. Sanzo was Dushaw's Union representative at both the Cleveland Joint Grievance Committee and Ohio State Joint Grievance Committee hearings. Yet Sanzo never raised several strong defenses on Dushaw's behalf. The Court has reviewed the transcript of the Cleveland Joint GrievanceCommittee hearing, and it is clear that Sanzo failed to point out that Dushaw was not served with warning letters concerning the Gray Drug and Beachwood delivery route incidents, as required by the collective bargaining agreement. Sanzo never argued that it was inappropriate to base Dushaw's discharge on the these incidents, since Dushaw had never been sent warning letters. Sanzo never pointed out that the letter of investigation

concerning the Gray Drug incident was untimely. Although Sanzo was present when the panelists questioned whether Scullion had loaded Dushaw's trailer and when they asked about Scullion's delivery loading manifest code number, Sanzo did not pursue the matter. Sanzo could very easily have learned that Scullion was not telling the truth about having loaded Dushaw's trailers. Finally, Sanzo made no attempt to interview witnesses who could support Dushaw's version of the events surrounding the Gray Drug incident. Even a rudimentary investigation would have revealed that two Roadway dispatchers had communicated with Dushaw during Dushaw's delay, another truck driver had corroborated Dushaw's explanation, and that the Gray Drug dock manager had

retracted an earlier statement about Dushaw's timeliness.

Sanzo testified at trial that Dushaw had earlier complained to Sanzo about being unfairly singled out by Roadway. Sanzo also testified that he had the power to obtain any of Roadway documents concerning Roadway's grievanceswith Dushaw. Yet Sanzo never even attempted to obtain the Roadway documents that would have corroborated Dushaw's position that he had been unfairly singled out. Instead, Sanzo felt he fulfilled his duty to represent Dushaw by arguing baldly that Dushaw was singled out, and not submitting any of the available supporting documentation.

The Court finds that all of the above conduct by Sanzo and Scullion provide ample evidence that Dushaw's

grievance was processed in an arbitrary, discriminatory fashion and in bad faith. The Union made no effort to provide available credible evidence in his defense.

CONCLUSIONS OF LAW

This Court has jurisdiction over this case pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. s 185(a). Section 301 grants federal courts jurisdiction to examine alleged violations of collective bargaining agreements:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined int his chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without

regard to the citizenship of the parties.

In a "hybrid" s 301 suit, in which a plaintiff employee asserts claims agains both his employer and his union, the claims of breach of the collective bargaining agreement and breach of the duty of fair representation are "interdependent." White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir.1990)."Unless [plaintiff] demonstrates both violations, he cannot succeed against either party." Id. at 560 (quoting Bagsby v. Lewis Bros. of Tenn., 820 F.2d 799, 801 (6th Cir.1987) (brackets in original)). Thus, to prevail in this "three-ring donnybrook,"[6] Dushaw must prove by a preponderance of the evidence that: (1) Roadway breached the collective bargaining

[6]Vaca v. Sipes, 386 U.S. 171, 210 (1967) (J. Black, dissenti

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agreement, and (2) the Union breached its duty of fair representation.

To state a claim for breach of the collective bargaining agreement, Dushaw must prove that Roadway violated one of the contractual provisions of the agreement. To state a claim for breach of the duty of fair representation, Dushaw must prove that the Union's actions were "arbitrary, discriminatory or in bad faith." Vaca v. Sipes, 386 U.S. 171, 207 (1967); see also Adkins v. United Mine Workers of America, 941 F.2d 392, 399 (6th Cir.1991). Another district court has explained such action as follows :

> Arbitrary or perfunctory union conduct, which is something more than mere negligence, can be a breach of the duty. However, a union is not liable for mere errors in judgment if they were made honestly and in good faith. Farmer v. ARA Services,Inc., [660 F.2d 1096, 1103 (6th Cir.1981)]; Ruzicka

> v. GeneralMotors Corp., 649 F.2d 1207, 1211-12 (6tCir.1981)....In addition, unexplained union in action, which substantially prejudices a member's grievance, may be sufficiently arbitrary to constitute a breach of the duty. Farmer v.ARA Services, Inc.,supra; Ruzicka [v. General Motors Corp.],supra.

Monroe v. Int'l Union UAW, 540 F.Supp. 249, 253 (S.D. Ohio 1982).

> A union must exercise care in disposing of its members' grievances since the collective bargaining agreement provides the union with the exclusive authority to pursue such grievances. See Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 n. 14 (1983); White v. Anchor Motor Freight, Inc., 899 F.2d at 559 n. 5 (quoting Vaca v. Sipes, 386 U.S. at 177). The Sixth Circuit has stated that a plaintiff may demonstrate a breach of the union's duty of fair representation by showing that the union processed the grievance "in a careless manner." Ryan v. General Motors Corp., 929 F.2d 1105, 1109 (6th Cir.1989). Other courts have indicated that "[t]o comply with its duty, the union must conduct some minimal investigation of grievances brought to its attention." Tenorio v. N.L.R.B., 680 F.2d 598, 601

(9th Cir.1982) (citations omitted). The union's required minimum effort varies with the circumstances of each case. Although we afford unions a reasonable range of discretion in deciding how to best handle grievances, union conduct that shows an egregiousdisregard for the rights of union members constitutes a breach of the duty of fair representation.

Id. (citations omitted).

Finally, a plaintiff does not state a cause of action merely upon a finding that the union breached its duty of fair representation.

> Even in the event of a union's breach of its duty of fair representation, [a grievance procedure decision] is not quickly set aside.... [T]o vacate [such a decision] on this ground, there must be two findings. First, the Union must have breached its duty of fair representation to the employee.Second, the breach of duty by the Union must have tainted the [grievance panel's] decision. The breach must have contributed to the [grievance panel]'s making an erroneous decision.

Wood v. Int'l Bhd. of Teamsters, 807 F.2d 493, 500 (6th Cir.1986).

First, then, the Court must determine whether Dushaw proved, by a preponderance of the evidence, that Roadway breached the collective bargaining agreement. The Court concludes that Dushaw has carried this burden. The collective bargaining agreement states that Roadway "shall not discharge nor suspend any employee without just cause." Just cause is defined by the Union as

> violations on the part of the employee ... of the rules and regulations of the Employer, or violations of the rules and regulations provided by municipal, state, or federal law, or authority as related to transportation or to general conduct, or unnecessary delay in the transportation of freight, or any employee's carelessness.

Just cause in this context has also been defined by the Sixth Circuit:

"Just cause means a cause based upon a reasonable ground and a fair and honest cause or reason regulated by good faith on the part of the party exercising the power to terminate." Scott v. Anchor Motor Freight, Inc., 496 F.2d 276, 281 (6th Cir.1974).

Given these definitions, none of the warning letters that Dushaw received show just cause. All of these warning letters refer to minor infractions. None of the warning letters cite any meaningful violation of a Roadway or governmental regulation, nor a significant delay in transportation of freight, nor to any significant negligence by Dushaw. Dushaw's explanations for these infractions are believable and credited, and the Court concludes that most of these infractions were in fact pretextual. The

Court finds that Roadway purposefully singled out Dushaw and built a "paper trail" of evidence to use against him. [7] It cannot be coincidence that this paper trail began soon after Dushaw was re-elected as shop steward in 1986, despite being warned not to run.

The Gray Drug incident did not provide Roadway with just cause to terminate Dushaw, either. The Court believes Dushaw's version of the facts surrounding this incident, and does not accept Roadway's version. Because Dushaw followed standard procedures, obeyed Roadway's directions, and acted reasonably

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[7]Indeed, one Roadway document, written on July 29, 1982 by garage superintendent James R. McGarvey, confirms that Roadw engaged in such practices. McGarvey wrote: "I just think Dushaw has no interest in improving his work habits. We wil start puttting pressure on him and star hanging paper on him every wrong move. Possibly this will get his attention."

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and responsibly at all times, Roadway had no just cause to terminate Dushaw. Moreover, under the collective bargaining agreement, Roadway was barred from using the Gray Drug incident as a basis for Dushaw's discharge. The collective bargaining agreement requires warning letters or letters of investigation to "be postmarked no later than ten (10) days following the Employer's knowledge of the violation." Because Roadway did not send Dushaw a letter of investigation until approximately 25 days after the Gray Drug incident, any reference to this incident at any disciplinary hearing was inappropriate.

Finally, the Beachwood delivery route incident also did not provide Roadway with just cause to terminate Dushaw. The Court has no doubt that this

incident was a purposeful attempt to "set up" Dushaw. It is highly improbable that the following events happened by chance: Dushaw's initial disciplinary hearing was postponed several days; on the day before the rescheduled hearing, he was assigned to drive a delivery route he usually did not drive; he was given an improperly loaded trailer; he was told to make a delivery to a customer that was not open for business; he was under hidden surveillance all day by a Roadway supervisor; and he was informed the same day that his activities would be discussed at the disciplinary hearing set for the next day. Even if these events did happen by chance, the Court again believes Dushaw's version of the facts surrounding this incident, and does not believe Roadway's version. Because Dushaw followed

standard procedures, obeyed Roadway's directions, and acted reasonably and responsibly at all times, Roadway had no just cause to terminate Dushaw.

Dushaw, then, prevails on his claim that Roadway breached the collective bargaining agreement. The Court must next decide whether Dushaw proved, by a preponderance of the evidence, that the Union breached its duty of fair representation. As discussed above, Dushaw's burden is an extremely heavy one. Courts should not interfere with the grievance procedures established by collective bargaining agreements, so long as the bargained-for process proceeds with a minimum of fairness and the integrity of that process was not undermined. The parties must abide by their bargain, and no court should substitute its view as to

the fairness of the result unless the grievance procedure was so tainted it produced the wrong result. Nonetheless, the Court finds that Dushaw has carried his burden on this claim as well.

Dushaw challenges the fairness of the grievance procedure he was given, claiming that: 1) Scullion, who was appointed to assist Dushaw at the company level hearing, not only failed to assist Dushaw but knowingly made false statements that were detrimental to Dushaw; and 2) Sanzo, who was supposed to assist Dushaw at the Cleveland Joint Grievance Committee and Ohio State Joint Grievance Committee hearings, failed to investigate matters where crucial evidence favorable to Dushaw could have been easily found and presented to the panels, and failed to assert timeliness defenses that would have

precluded the panels from hearing damaging statements.

This Court finds Dushaw's claims to be true. As discussed above, Sanzo did not seriously pursue several "defenses" before the grievance committees, which would have indicated that Dushaw was improperly terminated. For example, Sanzo failed to point out that Dushaw could not be terminated based on incidents alleged in warning letters that were more than nine months old, nor that Dushaw could not be terminated for incidents about which he had received no warning letter. In addition, Sanzo failed to conduct any investigation as to whether other evidence existed that would support Dushaw's account of the Gray Drug events. In fact, even though Gray Drug formally withdrew a complaint which had been lodged against

Dushaw by a Gray dock person, that fact was never brought up during the entire three-level grievance process.

The transcript of the local hearing also reflects that Sanzo did not vigorously defend Dushaw throughout the hearing, notwithstanding Sanzo'sexperience in these sorts of proceedings and the severe consequences faced by Dushaw. Aside from his direct presentation of Dushaw's case, Sanzo did not respond to several arguments made by Roadway or to pivotal questions posed by panel members. Sanzo's glaring failures were extremely prejudicial to Dushaw. In addition, the Court believes that the background of events at the Union, which reveals Sanzo's serious animosity toward Dushaw, reflects

badly upon Sanzo's ability to fairly represent Dushaw. [8]

As for Scullion, the Court finds that Scullion was hostile to Dushaw and that Scullion made false statements concerning the loading of Dushaw's trailer and other data critical to Roadway's decision to discharge. Roadway's initial decision to discharge Dushaw and the decision of the grievance committee to uphold Dushaw's discharge depended greatly upon Scullion's contentions that he had loaded Dushaw's trailers and that Dushaw

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[8]The Court does recognize, however, that Sanzo apparently gave Dushaw adequate representation at two prior disciplinary hearings. Sanzo represented Dushaw in May of 1986, when Dushaw's one-day suspension was upheld. Sanzo again represented Dushaw in June of 1986, and was successful in getting Dushaw reinstated after Dushaw had been discharged.

could have easily unloaded them. However, the evidence shows that Scullion did not help load these trailers and most likely could not have known whether the freight was arranged improperly. Furthermore, the Court has grave concerns about the propriety of a shop steward, who is supposed to represent the Union member at a disciplinary hearing, being the primary attestant to that member's misdeeds.

The Union had three separate duties: to treat Dushaw "without hostility or discrimination;" to assert Dushaw's rights "in complete good faith and honesty;" and to "avoid arbitrary conduct." Ruzicka v. General Motors Corp., 523 F.2d 306, 309-10 (6th Cir.1975). The Court finds that the Union failed on all three counts. The Union's conduct as shown by Sanzo cumulatively

amounted to arbitrary, discriminatory, and bad faith processing of Dushaw's grievance, in violation of the Union's duty of fair representation. The Court further finds that this conduct significantly tainted the grievance proceedings to the extent that but for such conduct, it is more likely than not that a different result would have ensued.

Further, the Court finds that Scullion's actions also amounted to arbitrary, discriminatory, and bad faith conduct, in violation of the Union's duty of fair representation. The Court finds that this conduct also significantly tainted the grievance proceedings to the extent that but for such conduct, it is more likely than not that a different result would have ensued. Dushaw prevails on his claim that the Union breached its

duty to provide him with fair representation.

Summary

The Court finds by a preponderance of the evidence that Roadway breached the collective bargaining agreement when it terminated Dushaw from his employment, and that the Union breached its duty of fair representation in the manner in which it pursued Dushaw's grievance. Accordingly, Dushaw prevails on the liability portion of these proceedings.

The Court now sets this matter for a status call on January 9, 1992, 3:00 p.m., at the United States Courthouse, Cleveland, Ohio, Room 212. At that time, the Court will schedule further proceedings as are necessary to establish Dushaw's damages.

IT IS SO ORDERED.

STATUTE INVOLVED IN THIS CASE

Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185:

Suits by and against labor organization

(a) Venue, amount, and citizenship.
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent - Entity for purposes of suit - Enforcement of money judgments.
Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom

it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction.

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process.

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his 5 acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RULE OF CIVIL PROCEDURE INVOLVED IN THIS CASE

Rule 52 (a)Federal Rules of Civil Procedure:

RULE 52.FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Effect.
In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the

court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

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Supreme Court, U.S.
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No. 95-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT DUSHAW,

Petitioner,

v.

ROADWAY EXPRESS, INC. AND TRUCK DRIVERS LOCAL UNION NO. 407,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 66 F.3d 129 (6th Cir. 1995); the opinion of the district court (Pet. App. 17) is unreported in F. Supp.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1995. The petition for rehearing en banc was denied on December 1, 1995. Pet. App. 14. The September 27, 1995 opinion was revised on that day. Pet. App. 15. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This "hybrid § 301" action was filed by petitioner, Robert Dushaw, under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, against respondents, Roadway Express, Inc. and Truck Drivers Union Local 407. The suit follows petitioner's unsuccessful attempts to overturn Roadway's decision to terminate his employment through the grievance machinery provided under the applicable collective bargaining agreement.

On April 21, 1987, as a result of numerous disciplinary infractions and work rule violations, Roadway discharged petitioner from his position as a truck driver. Pet. App. 6. At the time of his discharge plaintiff was a member of the International Brotherhood of Teamsters Chauffeurs, Warehousemen, and Helpers of America, Local 407 and was employed under the terms of the applicable collective bargaining agreements, which are known as the National Master Freight Agreement and the Central States Area Local Cartage Supplemental Agreement. Pet. App. 19-20.

Before his discharge, petitioner sought and obtained, on April 21, 1987, an informal company level hearing concerning his discipline. Pet. App. 4-5. Petitioner was represented at this hearing and throughout the grievance proceedings by Richard

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[1] The opinion appears at 122 L.C. (CCH) ¶ 10,246 (N.D. Ohio 1992) and 140 L.R.R.M. (BNA) 2461 (N.D. Ohio 1992).

Sanzo, Local 407 Business Agent. Pet. App. 5. Also present at the company level hearing was Ken Scullion, a union steward. At the company level hearing, Roadway asked Scullion some impromptu questions regarding his dock activities in connection with the loading of petitioner's truck. Scullion responded to these questions. Scullion did not attend any later hearings. Pet. App. 6-7.

After Roadway discharged Petitioner, the Union filed a grievance with the Cleveland Joint Committee, an arbitration panel composed of neutral industry and union members. Pet. App. 6-7. A hearing was held at which petitioner was represented by Sanzo. Pet App. 7. The Union then pursued the grievance to the arbitration panel of the State Joint Committee. The numerous issues considered at both the Cleveland and State hearings essentially were the same. At the hearings, petitioner testified that he was satisfied with Sanzo's representation and had an adequate opportunity to present all of his arguments to the Committee. The State Committee upheld the discharge. Pet. App. 8.

The union then sought a new grievance hearing to reopen the case, claiming that Dushaw had new evidence to present. After reviewing the alleged "new evidence", the State Committee again upheld the discharge. Pet. App. 62.

Petitioner brought this § 301 action against the Union and Roadway in the Northern District of Ohio. Almost two years after the conclusion of a bench trial, and without the aid of a trial transcript, the district court found for petitioner. The district court determined that Roadway had targeted petitioner for termination and had wrongfully discharged him. Pet. App. 8. The court also concluded that the Union had breached its duty of fair representation during the course of the grievance proceedings. The court stated that Sanzo had not vigorously defended petitioner and failed to adequately investigate the incidents leading to the discipline. The court found that Scullion had made false statements regarding petitioner's conduct and that both Sanzo and

Scullion generally bore animosity toward the petitioner based on their previous history. Pet. App. 82-3.

In its conclusions of law, the court found that the Union had failed: "to treat [petitioner] 'without hostility or discrimination;'" "to assert [petitioner's] rights 'in complete good faith and honesty;'" and "to 'avoid arbitrary conduct.'" Pet. App. 84 (quoting *Ruzicka v. General Motors*, 523 F.2d 306, 309-10 (6th Cir. 1975)). The court also concluded that the Union's conduct "significantly tainted the grievance proceedings to the extent that but for such conduct, it is more likely than not that a different result would have ensued." Pet. App. 85. The court awarded damages and attorneys' fees and assessed punitive damages against Roadway. Pet. App. 9.

The Sixth Circuit reversed. The court noted that to recover from either Roadway or the Union in a § 301 action, petitioner had to prove a breach of the collective bargaining agreement by Roadway, a breach of the duty of fair representation by the Union, and taint from the Union's breach such that the outcome of the proceeding was more than likely affected. Pet. App. 9-10. The court determined that petitioner had failed to prove the latter. Pet. App. 11. The court, assuming *arguendo* that the Union had acted in an arbitrary, discriminatory or bad faith manner, held that petitioner had failed to prove that the Union's alleged breach had tainted the grievance proceedings and that petitioner had failed to show that, but for the breach, the outcome of the proceedings would likely have been different. Pet. App. 11-12.

The court concluded that petitioner had an adequate opportunity to present all of the issues that he wished to present, based upon the records of the hearings and petitioner's own statements to that effect. Moreover, petitioner failed to point to any evidence that was missing from the grievance proceedings and which, if presented, would probably have brought about a different decision. Pet. App. 12.

ARGUMENT

This is an employee discharge matter, which turns on the individual facts of this case. While petitioner purports to raise legal issues, the law applied by the court of appeals is well-settled. There is no confusion or conflict in the courts of appeals, nor does the court of appeals decision contravene any decision of this Court. The decision below does not merit further review by this Court.

1. Petitioner argues that the court of appeals erroneously interpreted § 301 of the National Labor Relations Act, 29 U.S.C. § 185, to require, as part of his claim that the union breached its duty of fair representation, proof that the grievance proceeding was tainted by the union's breach and that such taint more than likely affected the outcome of the proceeding. *See* Pet. App. 10.

a. Petitioner did not raise this argument in his brief to the court of appeals. Petitioner, instead, argued that the district court had correctly found taint in its proceeding. As a result, the court of appeals did not have an opportunity to directly address the issue of whether taint is required in these cases. Issues raised for the first time in a petition for certiorari are not properly before this Court. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

b. In any event, the court of appeals's interpretation of § 301 comports with this Court's own interpretation in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

Generally, where grievance machinery is set up by contract to settle disputes between labor and management, courts will defer to the decisions of the arbitrators. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Nevertheless, the *Hines* Court determined that a union's breach of its duty of fair representation during grievance proceedings could relieve an employee of the requirement that he settle dispute through the contractual procedures. The "bar of the finality provisions of the contract" will not, however, be lifted

unless the union's breach "seriously undermines the integrity of the arbitral process." *Hines*, 424 U.S. at 567.

In order to prove a breach of the duty of fair representation, an employee must show that the union's action was either "arbitrary, discriminatory or in bad faith." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (internal quotations omitted). Moreover, as the court of appeals correctly noted in this case, an employee must show that "the Union's actions tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach." Pet. App. 10. This requirement plainly follows from this Court's decision in *Hines*.

In addition to indicating that the union's breach must "seriously undermine[ ] the integrity of the arbitral process," the *Hines* Court found that where an employee has utilized the contractual grievance and arbitration proceedings, as in this case, the focus is on "whether there is substantial reason to believe that a union breach of duty contributed to the *erroneous outcome* of the contractual proceedings." *Id.* at 568 (emphasis added). In a summary at the conclusion of its opinion, the *Hines* Court concluded that employees are entitled to relief "if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee." *Id.* at 572. There is no question that the court of appeals was correct in requiring that the petitioner show that the union's breach of duty tainted the proceeding and resulted in an erroneous discharge.

Petitioner concedes that "most of the courts of appeals" and "most, if not all" of the courts of appeals that have considered this issue have agreed with the Sixth Circuit. *See* Pet. 17-18. Petitioner cites cases from the Eighth, Fourth, Fifth, and Seventh Circuits, which have agreed with the Sixth Circuit. Pet. 17-18. Petitioner fails to cite any court of appeals decision to the contrary.

2. Petitioner claims that there is confusion in the law regarding the evidence necessary to prove the requisite "taint." Petitioner asserts that the court of appeals decision in this case requires, in effect, that an employee produce the testimony of the panel

members who decided the case at issue in order to show that the outcome was affected by the union's breach of duty. Petitioner argues that no one can meet such a requirement because of the doctrine of judicial immunity. Pet. 19-20.

a. Petitioner's claim is a mischaracterization of the court of appeals decision in this case. Petitioner simply failed to present any evidence that the decision was tainted. For example, petitioner failed to pinpoint any "missing evidence" that "would have caused the employer to reconsider a decision to discharge the employee." Pet. App. 12. The court was further persuaded by the fact that petitioner "admitted at the state level hearing that he had had an opportunity to present all issues he wished to present." *Id.*

Petitioner's failing in this regard is highlighted by cases in which the taint requirement has been satisfied. In *Hines* itself, for example, the petitioners were able to point to specific evidence not introduced by the Union, casting doubt on the employer's charges, that the union would have found had it performed an adequate investigation. 424 U.S. at 558. In *Black v. Ryder/ P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994) the Sixth Circuit upheld a jury's determination that a union breached its duty where the plaintiff specifically showed the union's lack of an adequate investigation. The court stated that the failure to present favorable evidence can constitute a breach "if that evidence probably would have brought about a different decision." *Id.* at 585. There is absolutely no suggestion here or by the *Black* court that a plaintiff must produce the testimony of the administrative decision-makers to satisfy the standard.

b. Petitioner claims that there is a conflict between the court of appeals's decision and the Eighth Circuit's decision in *Thomas v. Bakery, Confectionary & Tobacco Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied sub nom. Metz Baking Co. v. Thomas*, 484 U.S. 1062 (1988). According to petitioner, the *Thomas* court determined that "taint" existed despite the fact that the arbitrator had had all of the essential facts before him. Petitioner attempts to contrast the court of appeals's

statement that the joint committee had heard "both sides of the story and had seen the manifest and records" in this case. Pet. App. 12.

Petitioner makes two critical mistakes. First, in this case, the main reasons supporting the conclusion that the proceeding had not been tainted were petitioner's own admission that he had presented all of the evidence that he wished to present at the hearing and petitioner's failure to point to any "missing evidence" that would have led to a different outcome. Pet. App. 12. Thus, not only did the joint committee hear "both sides of the story," but they heard the complete story. *Id.*

Second, petitioner misconstrues *Thomas*. The district court, in setting aside the jury's verdict, ruled that the arbitrator had all of the essential facts before him. The *Thomas* court, however, rejected this conclusion. The court determined that the arbitrator had one person's version of a document essential to the case rather than the actual document. *Id.* at 763. The court found that, under the facts of that particular case, had the union adequately represented the employee, it would have produced a copy of the contract for the arbitrator. *Id.* Thus, the *Thomas* court, contrary to petitioner's characterization, concluded that there was taint precisely because the arbitrator did not have all of the essential facts in front of him.[2] There is no conflict between this case and *Thomas*.

3. Petitioner argues that the court of appeals failed to apply correctly this Court's decision in *Anderson v. City of Bessemer City*, which delineated the proper application of the clearly erroneous standard of review. 470 U.S. 564, 573-6 (1985).

This issue does not warrant review by this Court. Petitioner does not allege uncertainty in the lower courts with regard to the application of *Anderson*, nor does he suggest that the Sixth Circuit's approach conflicts with any other appellate courts.

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[2] The *Thomas* decision is another example of a petitioner who proved taint apparently without the testimony of the arbitrator.

Furthermore, petitioner's claim of error in this case is incorrect. The court of appeals was well aware of *Anderson* and acted within its confines. Pet. App. 11 (quoting *Anderson*, 470 U.S. at 573). The court of appeals did not make independent credibility determinations nor did it reweigh the evidence. The court of appeals simply concluded that there was no taint because there was "*no* evidence to support a finding that [union] actions tainted the grievance procedure." Pet. App. 11 (emphasis added).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

ROBERT DUSHAW,

Petitioner,

vs.

ROADWAY EXPRESS, INC. and TRUCK DRIVERS UNION LOCAL 407,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRUCK DRIVERS UNION LOCAL 407

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly reversed the District Court's judgment, on the basis that any breach of the Union's duty of fair representation did not affect the ultimate outcome of the Petitioner's grievance.

2. Whether the Court of Appeals properly applied the "clearly erroneous" standard in reviewing the District Court's factual findings.

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STATEMENT OF THE CASE

A. Statement of Facts

Dushaw was a city delivery truck driver employed by Roadway Express, Inc. ("Roadway" or "the Company") and was a member of Truck Drivers Union Local 407 ("Local 407" or "the Union"); he was the Union steward for approximately 5 years, until the date of his termination. (TR I 10).[1] The terms and conditions of Dushaw's employment were governed by a multi-employer collective bargaining agreement known as the National Master Freight Agreement, the Central States Area Local Cartage Supplemental Agreement, and the Ohio Addendum thereto (collectively, "the Contract").

The Contract provides a multi-step process for the implementation of employee discipline, including discharges, and for the resolution of grievances. Under the Contract and the Ohio Addendum, no employee may be discharged or taken out of service without first being given a hearing by his employer. If the parties are unable to resolve the matter at the company level, a formal grievance is filed and heard by the Cleveland Joint Committee, a joint labor-management committee composed of representatives of Local 407 and of freight industry employers in the Cleveland area (referred to as the "Cleveland hearing" or the "local-level hearing"). If there is no resolution at the Cleveland hearing, the next step of the grievance process is a hearing in Columbus, Ohio before the Ohio Joint State Grievance Committee ("the Joint State Committee"), a joint committee composed of equal numbers of representatives of

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1. The trial proceedings were transcribed by two different court reporters. The first five days of the trial are contained in three separate volumes, numbered pages 1-686, designated as TR I. The remaining two days of the trial were transcribed in two volumes paginated 1-357 and designated as TR II.

other local unions and other freight companies. Joint State Committee members may not hear cases involving their own local union or their own company.

Roadway called a company-level hearing for April 21, 1987, indicating that it intended to discharge Dushaw based on his overall work record. (TR I 296-97). Richard Sanzo, the Union business representative, attended the company-level hearing as the primary representative arguing on behalf of Dushaw; alternate Union steward Ken Scullion was in attendance primarily as a witness to the proceedings. (TR II 308-09, 311-12). Sanzo previously had successfully presented two grievances filed by Dushaw, one involving a one-day suspension and the second — just 10 months earlier — involving a discharge, which Sanzo was able to have reversed. (TR I 269-72).

At the hearing, the Company discussed a number of warning letters issued to Dushaw and two major incidents, one involving a delivery to Gray Drug on March 4 and the other a series of deliveries to the Beechwood area on the previous day, April 20. (TR I 296-97). The first incident occurred when Dushaw allegedly took too long to unload a delivery at a Gray Drug warehouse. The customer had written Roadway to complain about Dushaw's idleness and his chatting with other delivery drivers while Gray Drug employees unloaded his freight; the letter requested that he not be sent on deliveries to its warehouse in the future.

The second major incident involved Roadway's claim that Dushaw wasted time in the Beechwood deliveries by passing over delivery stops, out of their logical order. Dushaw argued the freight was loaded in his truck in such a way that he could not reach the items for the planned earlier stops until he unloaded the freight for what should have been later stops.

Although neither Sanzo nor Dushaw knew in advance exactly what issues the Company would raise to support its planned discharge of Dushaw, Sanzo responded to the Company's arguments and allegations and even persuaded Roadway to withdraw some of the previously issued warning notices. (TR I 297-300). At the trial, Dushaw's only complaint about the manner in which Sanzo handled his grievance at the company-level hearing was his failure to insist on the presence of a Company supervisor as a possible witness, even though Dushaw did not know what the supervisor would say, the Union had no power to force the Company to produce him, and Sanzo was concerned that a Company man would not help Dushaw's case. (TR I 304-06, 664). At the conclusion of the company-level hearing, Roadway notified Dushaw his employment was being terminated based on his overall work record and on the events during the Gray Drug and Beechwood deliveries. (TR I 132, 301).

Dushaw and Sanzo discussed the evidence that should be used to support Dushaw's grievance over his discharge and Dushaw, an experienced Union steward, gathered evidence for Sanzo to present on his behalf. (TR I 136-39; TR II 306). At the Cleveland hearing, as Dushaw acknowledged, Sanzo made every argument Dushaw wanted presented and challenged each and every contention made by Roadway at that hearing. (TR I 315-16). Dushaw also was able to make a statement and to say anything and everything he wanted to in his own defense. (TR I 316-17). The Cleveland Joint Committee was deadlocked on the grievance, and it was referred to the next level, the Joint State Committee. (TR I 145-46, 318-19; TR II 307).

Before the Joint State Committee hearing, Dushaw gave Sanzo for his review a handwritten statement, which Sanzo told him to have typed up by a secretary at the Union office; the two-page, typed statement was later read at the hearing. (TR II 307-

08; TR I 329). Before the hearing on May 21, 1987, Sanzo met with Dushaw for approximately 45 minutes to review the facts of his case and their presentation. (TR I 333-34). During the hearing, Sanzo read Dushaw's statement, addressed the Company's evidence and made every argument Dushaw wanted him to make in the presentation of his case.[2] (TR I 335-49). Dushaw spoke to the panel members throughout the proceedings and, as he admitted, was able to present any statements or evidence he wanted to present. (TR I 335-49). The unanimous decision of the Joint State Committee, which was final and binding under the Contract, was to deny Dushaw's grievance and uphold the discharge. (TR I 149-50, 349).

Following the decision from the Joint State Committee, Dushaw obtained a written statement from Gray Drug, confirming a prior verbal statement from Gray Drug that Dushaw had conveyed to the Joint State Committee at the hearing. The written statement supported his position on some, but not all, of the facts relating to that incident, although Gray Drug never retracted its request that Dushaw no longer make its deliveries. Sanzo filed a new grievance on Dushaw's behalf, asking that his discharge be reconsidered on the basis of new evidence. This grievance was processed through the contractual processes; eventually, the Joint State Committee issued a decision refusing to reopen the case, on the grounds that the written statement did not constitute new evidence. (TR I 153-57, 161, 350-54).

At the trial, Dushaw attempted to second-guess every action and argument by Sanzo through the three steps of the grievance

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2. The Cleveland hearing was the only step of the grievance proceedings for which a transcript was prepared. However, the parties agreed that all the arguments presented at the Cleveland hearing were presented to the Joint State Committee.

process; before this Court, however, his protest centers on alternate steward Ken Scullion's purportedly false "testimony" at the company-level hearing. Dushaw never objected to Scullion's presence at the hearing.[3] (TR II 304-06). Moreover, Scullion did not testify against Dushaw, as he asserts, but simply responded to questions from his employer regarding his work as a loader on Dushaw's truck on March 4 and April 20. (TR II 304, 307; TR II 217-19). Sanzo did not know that Scullion, who was present only as an observer, had any knowledge of those matters or that the Company would ask him any questions as a fact witness. (TR II 304).

Dushaw asserts that Scullion made a statement at the April 21 hearing that most or all of the freight for the Gray Drug delivery was on skids or pallets, making it easier to unload quickly and supporting the Company's position that Dushaw spent more time than he should have. Petition for Writ of Certiorari at 5 [hereinafter "Petition"]. This statement is not supported by the record. The employer's representative said at the Cleveland hearing that Scullion had "indicated they could have been but they may not have been [skidded]. So we called and got the bill [of lading]. They were skidded and the manifest indicates they were skidded. . . ." (Plaintiff's Trial Ex. 9).[4] The

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3. Dushaw states that there was "bad blood" between him and Scullion (Petition for Writ of Certiorari at 4), an assertion not supported by the record. At most, Scullion had run against Dushaw for the position of Union shop steward; Scullion was later appointed alternate steward, a position that was required in part because Dushaw as a city driver was often away from the terminal when a steward was needed. There was no evidence of any other conflict between the two, and the suggestion that Scullion would lie to the Company to achieve Dushaw's discharge because he wanted Dushaw's position — the unpaid and largely thankless job of shop steward — is simply not credible.

4. Scullion did not appear in any capacity at the Cleveland or Columbus

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Company relied not on information supposedly received from Scullion but on its own documents to support its position that a great portion of the Gray Drug load was on skids. Dushaw contradicted Roadway's position, testifying before the Cleveland Committee that his freight was not skidded as alleged by the Company and that he had loose cartons in his trailer; this argument was also presented at the Joint State Committee hearing. (TR I 630-31; TR II 325).

Regarding the Beechwood incident, Dushaw states Scullion had said that he (Scullion) had loaded "a majority" of the freight on Dushaw's trailer on April 20 and that it was loaded properly. Dushaw then argues that the Company relied upon these statements by Scullion when it presented its evidence at the Cleveland and Columbus hearings. Petition at 7. However, at the Cleveland hearing the panel members had available to them the Company's manifest showing that 14 different individuals had loaded Dushaw's trailer that day, and it was clear to the Committee members that no one person had loaded the majority of Dushaw's freight. The Company conceded that, though Scullion may have checked Dushaw's load, he did not personally load the freight. (Plaintiff's Trial Ex. 9 at 76-80). The Company and the arbitration panel members did not rely on any statements that Scullion made concerning the Beechwood incident but, rather, on the manifest, a Company document. In addition, Company officials stated at the Cleveland and Columbus hearings that they had checked the truck and found it to be properly loaded, so any statement by Scullion[5] was simply not

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hearings; to the extent his statements were considered at these hearings, they were related to the Committees by the Company's representatives. Scullion did not testify at trial because of a serious medical problem. (TR. II 203).

5. The conclusion that Scullion spoke falsely is not supported by the evidence, which did not show that Scullion ever stated he had personally
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dispositive. (TR II 12, 21719, 275-76). Moreover, Sanzo was not concerned with how the trailer was loaded because freight moves around in a trailer once it is away from the dock and the driver must deliver it in the best manner possible. (TR II 305). The way the freight was delivered was the more critical issue, Sanzo argued, and Dushaw made the Beechwood deliveries in the best way he could.

Dushaw refused to accept the unanimous decision of the Joint State Committee that Roadway had good cause to discharge him. He filed this action against the Company and the Union, alleging that Roadway breached the provision of the Contract permitting it to discharge him only for just cause and that Local 407 breached its duty to represent him fairly in the grievance process.

B. Proceedings in the District Court

A bench trial was held from January 22 through January 26 and January 29 through January 30, 1990. Two years later, on January 3, 1992, the District Court issued an opinion finding that Roadway breached the collective bargaining agreement when it terminated Dushaw's employment and that Local 407 breached its duty of fair representation in the manner in which it pursued Dushaw's grievance. (A.17). The District Court issued its decision without benefit of a transcript of the trial, which was prepared only for the appeal.

After briefing by the parties on a variety of issues relating to

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loaded the truck. Dushaw testified he could not remember exactly what Scullion said at the company-level hearing but agreed that Scullion said he had *checked* the trailer and "there was no reason I [Dushaw] couldn't deliver from point A to point B." (TR I 307). The Company's Operations Manager also stated that the freight was properly loaded. (TR I 454, 460-63).

damages, on September 18, 1992, the trial court awarded Dushaw compensatory damages in the amount of $107,774.19 and attorney's fees and costs in the amount of $165,450.22, both apportioned between the Defendants according to a formula set forth in the trial court's order of April 9, 1992, and punitive damages against Roadway in the amount of $100,000. (R.213: Memorandum and Order). By order dated October 28, 1992, the trial court denied Dushaw's motion for reconsideration or clarification of the damages ruling, concluding the case and making all previous orders final and appealable. (R.223: Memorandum, Opinion and Order).

C. Proceedings in the Court of Appeals

Both the Union and Roadway appealed the trial court's rulings on liability and damages; Dushaw appealed certain of the trial court's rulings on damages and other aspects of the remedy. The parties briefed and argued the case in the Court of Appeals for the Sixth Circuit, after lengthy delays in the preparation of the transcript of the District Court proceedings caused by the intervening death of one of the two original court reporters. On September 27, 1995, the Sixth Circuit issued its decision reversing the judgment of the District Court. (A.1).

The Court of Appeals assumed, *arguendo*, that the Union acted in a bad faith, arbitrary or discriminatory manner but held that there was no evidence to support the District Court's finding that such actions tainted the grievance procedure. (A.11). Because the evidence showed that "the ultimate decision to affirm Dushaw's discharge was made by a committee who heard both sides of the story" and had seen all the relevant evidence, and because Dushaw admitted that "he had had an opportunity to present all issues he wished to present," the court found that there was no indication the Union failed to present any evidence that " 'probably would have brought about a different decision' in the grievance proceeding." (A.12). Accordingly, the Court of

Appeals ruled that the District Court's finding that the presumed violation of the Union's duty of fair representation tainted the grievance proceeding was clearly erroneous. *Id.*

The Petitioner filed a request for rehearing and rehearing en banc in the Court of Appeals. The petition for rehearing en banc was denied, and the request for rehearing was referred to the original panel. (A.14-15). The panel denied the request for rehearing but revised its opinion to append a separate concurring opinion by Circuit Judge Wellford. The short concurring opinion —*not* the panel's decision, as the Petitioner now states (Petition at 11) — noted that:

> this case presents a very close question on the question of taint as a consequence of Scullion's mistaken or false testimony. The taint, if any, however, in my view, as expressed by our opinion in light of the entire record, did not affect the ultimate outcome.

(A.15). The concurring opinion went on to note that, even if Dushaw had prevailed on the merits of his claim, he would have been entitled to receive, at most, only appropriate compensatory damages after mitigation and reasonable attorney fees and that the District Court's award, which included "improper punitive damages and exorbitant fees and interest," would have been set aside. *Id.*

REASONS FOR DENYING THE WRIT

The Petitioner has asked this Court to review this case on the grounds that the Sixth Circuit — along with every other Court of Appeals that has considered the question — has misapplied the law regarding the elements of an employee's "hybrid 301" suit under the National Labor Relations Act, that the Sixth Circuit's decision on the quantum and nature of proof in such cases is in conflict with a decision of the Eighth Circuit and that the Sixth Circuit improperly applied the "clearly erroneous" standard in reviewing the factual findings of the trial court. None of these arguments has merit, and they are merely intended to obscure and muddle what in reality is a simple case.

Examining the specific facts of this case, the Court of Appeals found that any breach of the duty of fair representation by the Union (if it occurred) simply did not affect the ultimate outcome of Dushaw's grievance hearing. Accordingly, the Sixth Circuit held there was no justification for overturning the final and binding arbitration decision, and the District Court's ruling in favor of the Petitioner was reversed. There is no basis for this Court to overturn the Sixth Circuit's ruling on this limited but dispositive issue, and the petition for a writ of certiorari should be denied.

A. The Finality of Labor Arbitrations

Our national labor policy clearly favors resolution of labor contract disputes by private, collectively bargained mechanisms. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d); *see also id.* §§ 157, 158(d), (e); *see generally Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). Federal courts do not have plenary power to review the merits of an arbitration decision.[6] *Hines*, 424 U.S. at 563. Rather, the courts must defer to the agreed-upon tribunal's interpretation of the contract "as long as the award draws its essence from the bargaining agreement." *Id.*

Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, vests in the federal district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." While such a cause of action is not expressly set forth in the statute, the courts have permitted actions known as "hybrid 301" suits, in which an individual union member may bring an action for breach of a collective bargaining agreement between the employee's union and the employer.

A plaintiff employee in a hybrid 301 suit must prove *both* that the employer's action violated the terms of the collective bargaining agreement *and* that the union breached its duty of fair representation with regard to the matter. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *see also Hines*, 424 U.S. at 570-71. Proof of unfair representation by the union is a prerequisite to finding liability against either the union *or* the employer. *Vaca*, 386 U.S. at 186. In the absence of unfair representation by the union, an employee does not have standing to sue to overturn the arbitration decision. *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 405-06 (6th Cir. 1988).

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6. The courts have "recognized that the decisions of joint management-labor panels are entitled to the same degree of deference accorded to the decisions of single arbitrators." *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 560 n. 6 (6th Cir. 1990); *see generally Hines* (involving decision by joint committee under a Teamsters' national master contract).

The courts apply a "highly deferential" standard when reviewing the conduct of a union to determine whether there has been a breach of the duty of fair representation. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). Specifically, a union does not breach its duty of fair representation to a member unless its actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190. This Court has held expressly that "mere negligence, even in the enforcement of a collective bargaining agreement, would not state a claim for breach of the duty of fair representation." *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990). Furthermore, "grievance processes cannot be expected to be error-free." *Hines*, 424 U.S. at 571.

B. The Requirement of Proving Taint in the Arbitration Process

In *Vaca v. Sipes*, which established the standards for determining when a union has breached its duty of fair representation, this Court considered a union's decision not to take an employee's grievance to arbitration. *Hines* addressed the liability of a union for its actions in presenting a grievance in arbitration. The *Hines* Court held that, to overturn an arbitration decision, employees "must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." 424 U.S. at 570-71. This rule was intended to balance the policy favoring the finality of labor arbitrations with protection for discharged employees who otherwise "would be left without jobs and without a fair opportunity to secure an adequate remedy." *Id.* at 571.

Specifically, *Hines* held that a plaintiff employee must prove "an erroneous discharge and the Union's breach of duty *tainting the decision* of the joint committee." *Hines*, 424 U.S. at 572 (emphasis added). In other words, a union's breach of its

duty of fair representation removes the bar contained in the finality provisions of a contract's arbitration clause only "if it seriously undermines the integrity of the arbitral process." *Id.* at 567. The question of whether a union breached its duty is "a wholly unnecessary determination if the union's conduct was irrelevant to the finality of the arbitral process." *Id.* at 568.

Applying this Court's ruling in *Hines*, "courts have held unions not liable for breaches of their duty of fair representation absent evidence that *but for the union's conduct the employee would not have been injured.*" *Wood v. Teamsters Local 406*, 807 F.2d 493, 502 (6th Cir. 1986), *cert. denied*, 483 U.S. 1044 (1987) (emphasis added) (citation omitted).

> The impact of the breach on the outcome must, moreover, have been substantial; to establish a breach of fair representation, the plaintiff must meet the onerous burden of proving that the grievance process was "*seriously flawed* by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct."

Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 585 (6th Cir. 1994) (quoting *Hines*, 424 U.S. at 570) (emphasis in original).

The Petitioner conceded that a plaintiff must show that a union's actions tainted the arbitration procedure when he cited *Black* for this proposition in his brief to the Sixth Circuit; instead, he argued that he had in fact proved taint.[7] Dushaw raised for the

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7. The Petitioner mentions the example suggested in *Hines* and *Bowen* of a breach of duty by a union that would remove the finality bar to challenging

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first time in this Court the argument that proof of taint should not be required, making this contention only after the Court of Appeals found the matter to be dispositive. More significantly, his argument is entirely without merit.

Petitioner correctly states that the Sixth Circuit, and every other Court of Appeals that has considered the question, has read *Hines* as requiring a plaintiff in a hybrid 301 case to prove that the breach of the union's duty substantially affected the integrity of — that is, tainted — the grievance process. *See, e.g., Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 915 (7th Cir. 1989); *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852 (5th Cir. 1989); *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local No. 433*, 826 F.2d 755, 758 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988); *Wood v. Teamsters Local 406*, 807 F.2d 493, 500-02 (6th Cir. 1986), *cert. denied*, 483 U.S. 1044 (1987); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1355 (9th Cir. 1981); *DeBoles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Hardee v. North Carolina Allstate Servs., Inc.*, 537 F.2d 1255, 1258 (4th Cir. 1976). There are two very good reasons why all these courts have ruled this way: their conclusion is based on the plain language of *Hines* and, furthermore, is the only logical result.

The Petitioner argues that the Circuit Courts have somehow

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an arbitration decision, where a union "manufactures evidence and knows from the start that it is false." *Bowen v. United States Postal Serv.*, 459 U.S. 212, 223 (1983) (citing *Hines*, 424 U.S. at 570). Petitioner then states that Scullion's statements at the company-level hearing are "quite similar" to this scenario. Petition at 17 n. 4. This statement might lead one to conclude that the evidence introduced at trial supported a theory that the Union somehow intentionally produced Scullion at the April 21, 1987, hearing and caused him to provide false information. However, there was no such evidence whatsoever.

expanded or placed a gloss upon *Hines*, adding a new element that this Court did not intend. This is nonsense. Quite clearly, whether the matter of "taint" is considered a "third element" in a hybrid 301 case, as Petitioner says, or is regarded as merely an aspect of a union's breach of duty, the principle that the union's actions must have substantially and adversely affected the outcome of the grievance procedure is an explicit requirement of *Hines*. The unanimity among the Circuits arises from the very clarity of this Court's statements in *Hines*, and there is no need to revisit the matter.

Furthermore, the requirement that the union's actions have affected the grievance process is consistent with both the policies underlying the federal labor law and with general, time-honored legal principles of causation and harmless error.

As noted, the law favors the finality of labor arbitrations, and a rule that arbitration decisions may not be set aside unless the integrity of the process was undermined serves this policy. Where the process has not "fundamentally malfunctioned" or been tainted because of the misconduct of the union, the employer should be protected from relitigation of a dispute that has been settled by final and binding arbitration under the collective bargaining agreement. *See Hines*, 424 U.S. at 567-69.

More generally, the law does not permit a remedy where there has been no harm from the alleged wrongful act. A motorist may cross the center line in a road, but he is not liable for his negligence if he strikes no one — the driver's lapse has done no damage. Similarly, an attorney may overlook a statute of limitations and file a lawsuit out of time, but he will not be liable for malpractice if his client's case was not meritorious and would have been dismissed on its merits — the attorney's error has caused the client no loss. In an example even more apropos, a trial judge may make an incorrect evidentiary ruling, but a new

trial will not be granted if the erroneously admitted or excluded evidence would not have affected the jury's verdict — the judge's mistake will be deemed "harmless error."

The matter of the effect of a union's breach of its duty of fair representation presents a situation directly analogous to these examples. Even where a union has failed to represent an employee fairly, if the deficiency did not affect the outcome of the grievance, it is no more than harmless error and is not grounds to set aside the arbitration procedure.

The ruling of the Court of Appeals in this case, affirming its earlier decisions that taint in the arbitration process is a necessary element of a hybrid 301 claim, is fully consistent with this Court's prior decisions, with the decisions of a majority of the circuit courts and with sound jurisprudence. There is no basis for this Court to overturn the Sixth Circuit's ruling.

C. The Level of Proof Required to Establish Taint

The Petitioner next argues that the Court of Appeals in this case went beyond the requirements of *Vaca* and *Hines* and ruled that a plaintiff must provide "additional, independent evidence . . . to prove taint" other than the evidence offered to prove the breach of duty. Petition at 19. Petitioner then goes on to discuss the difficulties of establishing that an arbitration proceeding was tainted, particularly in light of the quasijudicial immunity from suit and the immunity from testifying afforded to arbitrators. The Petitioner states that the Sixth Circuit required him to present testimony to prove taint, a requirement purportedly at odds with the decision of the Eighth Circuit in *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988).[8]

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8. Again, the Petitioner failed to raise this argument before the Court of Appeals, and did not even cite the *Thomas* case in his two lengthy appellate briefs.

Petitioner misstates the ruling of the Sixth Circuit and creates a false portrayal of a conflict in the Circuits. The Court of Appeals in this case discussed generally the requirement that any breach of the union's duty of fair representation must have tainted the arbitration proceedings, noting that a plaintiff must prove "that the outcome was more than likely affected by the Union's breach" and that the breach "seriously flawed" the arbitration process. (A.10). The Sixth Circuit cited to its decision in *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994), which in turn quoted this Court's decision in *Hines* regarding the requirement that the process have been seriously flawed.

Nowhere in its decision in this case did the Sixth Circuit hold that testimony from an arbitrator, or any other specific evidence, was required to establish the necessary taint, as Dushaw asserts. At most, the Court of Appeals ruled that, because the arbitration panel had before it all relevant evidence and arguments, there was "no indication that the Union failed to present evidence that 'probably would have brought about a different decision' in the grievance proceeding." (A.12 (quoting *Black*, 15 F.3d at 585)).

This conclusion is entirely consistent with this Court's rulings in *Vaca* and *Hines*. Furthermore, it is compatible with the Eight Circuit's decision in *Thomas*, in which the Court of Appeals concluded that, unlike this case, all the relevant information was *not* placed before the arbitrator. In *Thomas*, the critical issue was the liability of a purchaser company to honor the seniority rights of the employees of a purchased company. The parties presented testimony of the purchaser's general counsel that the transaction was merely an asset transfer that did not obligate it to honor the employees' seniority. However, the union did not seek to obtain a copy of the purchase agreement — which ultimately turned out to contain a clause in which the

purchaser assumed the seller company's labor contracts, including seniority provisions — and it was not provided to the arbitrator. The union's failure to present to the arbitrator what the court deemed to be "the most important evidence on this issue" was held to be a serious flaw in the process. *Thomas*, 826 F.2d at 763.

The Eighth Circuit in *Thomas* rejected the defendants' arguments that the arbitrator had all the essential facts before him; in the present case, on the other hand, the Sixth Circuit found just the opposite, that the ultimate decision-maker, the Joint State Committee, did have all the relevant facts and arguments before it. This case and *Thomas* are simply mirror images of each other, and the Petitioner cannot manufacture a split in the circuits requiring resolution by this Court from these two corollary cases.

In this case, the Court of Appeals concluded there was no evidence that a different course of action by the Union probably would have brought about a different decision by the Joint State Committee. The court did not require testimony by the arbitrators that they would have reached a different conclusion, but merely held that, objectively, no reasonable factfinder could find that a different outcome probably would have resulted. The Sixth Circuit did not require an insurmountable level of proof of taint in the arbitration process, and Petitioner's argument that this Court should grant certiorari on this basis is without merit.

D. The Sixth Circuit's Application of the "Clearly Erroneous" Standard

The Petitioner asserts that the Sixth Circuit improperly overturned the factual findings of the District Court, in derogation of this Court's ruling in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), which applied the rule that an

appellate court may overturn a trial court's findings only if they are "clearly erroneous." The Petitioner cites *Anderson's* ruling that a court of appeals may not reverse a trial court simply because it would have decided the case or weighed the evidence differently. Petition at 24 (citing *Anderson*, 470 U.S. at 573-74). Specifically, the Petition notes that, under *Anderson*, a trial judge's factual finding that is not internally inconsistent and that is based on a decision to credit one witness over another, where each "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence[,] . . . can virtually never be clear error." Petition at 25 (citing *Anderson*, 470 U.S. at 575).

Again, the Petitioner correctly states the law but mistakes its application to this case. The Sixth Circuit reversed the District Court's judgment in this case solely because there was no evidence that the assumed breach of the Union's duty of fair representation tainted the grievance process or affected the outcome of the arbitration. (A.11-12). There was essentially no factual dispute on this key question, as Dushaw himself admitted that all the facts and arguments he wished to have presented were in fact raised at the Cleveland hearing and, most significantly, at the Joint State Committee hearing where the final decision on his discharge was made.

The Petitioner asserts that the District Court's "findings were based upon numerous credibility determinations." Petition at 25. This may or may not be accurate as to the trial court's findings on the specific details of Dushaw's work performance, the Company's actions and the Union's investigation and presentation of his case.[9] However, the critical issue here —

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9. The Union submits that, in any event, the general rule of deference to a trial court's factual determinations is of dubious applicability in a case such as this, where the trial judge did not issue a decision for two full years after the trial and, unlike the Court of Appeals, did not have the benefit of a trial transcript to review the evidence and make her findings.

whether all the material facts and arguments were placed before the Joint State Committee as the ultimate decision-maker — simply was not determined based on credibility.

Dushaw argues that the Sixth Circuit erred in holding that the District Court's finding of taint was clearly erroneous when the appellate court "conceded in denying rehearing that it was a 'very close question on the question of taint.' " Petition at 26. This is a misstatement of the Court of Appeals' ruling. First, only the separate concurring opinion of Judge Wellford, *not* the decision of the full panel, mentioned any "close question."

More significantly, a reading of Judge Wellford's full opinion indicates that, in fact, he supported the panel's ultimate conclusion that the Union's conduct clearly did not have a substantial impact on the outcome of the arbitration. Judge Wellford said:

> [T]his case presents a very close question on the question of taint as a consequence of Scullion's mistaken or false testimony. The taint, if any, however, in my view, as expressed by our opinion in light of the entire record, *did not affect the ultimate outcome*.

(A.15 (emphasis added)).

The only fair reading of this opinion is that Judge Wellford believed it was a close question as to whether Scullion's statements tainted the Union's representation of Dushaw in the grievance process, although Judge Wellford perhaps used the word "taint" imprecisely. Unquestionably, however, he agreed with the full panel that Scullion's statements did not "taint" the arbitration process within the meaning of *Vaca* and *Hines*, as they did not "seriously undermine[ ] the integrity of the arbitral process." *Hines*, 424 U.S. at 567.

The Court of Appeals did not find that the issue of taint was a close question but, rather, properly held that the District Court's factual finding on this dispositive issue was clearly erroneous. Accordingly, the Petitioner's argument on this point does not provide a basis for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, Respondent Truck Drivers Union Local 407 respectfully prays that this Court deny the Petitioner's application for a writ of certiorari.

Respectfully submitted,

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